No. _____

IN THE

Supreme Court of the United States

BEIJING SHOUGANG MINING INVESTMENT COMPANY, LTD., CHINA HEILONGJIANG INTERNATIONAL ECONOMIC AND TECHNICAL COOPERATIVE CORP., QINHUANGDAOSHI QINLONG INTERNATIONAL INDUSTRIAL CO. LTD.,
Petitioners,

v.

MONGOLIA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

It is settled that courts decide independently (*i.e.*, *de novo*) whether a given dispute is arbitrable unless the parties have agreed to give the arbitrator the "primary" power to decide arbitrability. In *First Options of Chicago, Inc.* v. *Kaplan*, this Court held that, in deciding "whether a party has agreed that arbitrators should decide arbitrability," courts must distinguish between (1) "allowing the arbitrator to make an initial (but independently reviewable) arbitrability determination" and (2) agreeing "to be effectively bound" by an arbitrator's arbitrability ruling. 514 U.S. 938, 944, 946–47 (1995). "Courts should not assume that the parties agreed to arbitrate arbitrability unless there is *clear and unmistakable evidence* that they did so." *Id.*, at 944 (cleaned up; emphasis added). Simply "arguing the arbitrability issue to an arbitrator" is not enough; it "does not indicate clear willingness to arbitrate that issue, *i.e.*, a willingness to be effectively bound by the arbitrator's decision" on arbitrability. *Id.*, at 946.

The question presented is:

Whether, as the Second Circuit held, participating in arbitration—including agreeing to a scheduling order as to the timing of jurisdictional objections and making arguments about jurisdiction to the arbitrators—is sufficient to show an agreement to arbitrate arbitrability, and thereby forgo the default *de novo* standard that governs judicial review of arbitrator decisions on arbitrability.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners are Beijing Shougang Mining Investment Company, Ltd. and China Heilongjiang International Economic and Technical Cooperative Corp., both Chinese state-owned entities incorporated in the People's Republic of China, as well as Qinhuangdaoshi Qinlong International Industrial Co. Ltd., a privately-held corporation organized under the laws of the People's Republic of China. All three were petitioners in the district-court proceedings and appellants below.

Respondent Mongolia is a foreign sovereign state and was the respondent-appellee below.

RELATED PROCEEDINGS

Court of Appeals for the Second Circuit:

Beijing Shougang Mining Inv. Co., Ltd. v. *Mongolia*, No. 19-4191 (2d Cir. Aug. 26, 2021) (reported at 11 F.4th 144).

United States District Court for the Southern District of New York:

Beijing Shougang Mining Inv. Co., Ltd. v. *Mongolia*, No. 17-cv-7436 (ER) (S.D.N.Y. Nov. 25, 2019) (reported at 415 F.Supp.3d 363).

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Cases

Treaties and Agreements

U.S. Statutes

Foreign Statutes

Other Authorities

Rules

PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The decision of the Court of Appeals for the Second Circuit is reported at 11 F.4th 144, and reproduced at Appendix ("App.") 1. The decision of the Southern District of New York is reported at 415 F.Supp.3d 363, and reproduced at App. 40.

JURISDICTION

The Second Circuit filed its published decision on August 26, 2021. That court denied Petitioners' request for rehearing *en banc* on October 14, 2021. App. 54. On Petitioners' application, and by order of November 19, 2021, this Court extended the time within which to file a petition for a writ of certiorari to March 11, 2022. This petition is thus timely, and the Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case implicates Chapters 1 and 2 of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*. The Appendix, at App. 77, reproduces relevant portions of the statute.

STATEMENT OF THE CASE

I. Factual Background

A. The Bilateral Investment Treaty

In 1991, Mongolia and the People's Republic of China entered into a bilateral investment treaty (the "Treaty"). Established to encourage investment between the two countries, the Treaty required each state to protect investors from the other state. Among other things, the Treaty guaranteed fair-and-equitable and most-favored-nation treatments for foreign investments, required prompt compensation for any expropriation, and guaranteed to investors the ability to recover investments and profits.

A bilateral investment treaty ("BIT") typically prescribes dispute-resolution mechanisms through which protected investors may bring claims against the other sovereign state for alleged Treaty violations, with arbitration being the norm. The Treaty between China and Mongolia, in Article 8(3), provides that investors of each state may submit "to an *ad hoc* arbitral tribunal" disputes with the other state "involving the amount of compensation for expropriation." App. 7.[1]

[1] As the Circuit explained, the selection of an "*ad hoc*" arbitration means "no arbitral institution is selected for administration of the arbitration, and that arrangements as to procedures must be made during the arbitration itself." App. 8.

B. The Parties And The Arbitration

In 2004, Petitioners Beijing Shougang Mining Investment Company, Ltd. and China Heilongjiang International Economic and Technical Cooperative Corporation—both Chinese state-owned companies—purchased equity in a joint venture that was established in 2002 by Petitioner Qinhuangdaoshi Qinlong International Industrial Company Ltd. ("Qinlong") to develop an iron-ore mine in Mongolia.

In 2006, Mongolia revoked the joint venture's mining license and awarded it to a Mongolian entity. Petitioners subsequently invoked their rights under the Treaty and initiated an arbitration against Mongolia in February 2010. The arbitration request alleged, *inter alia*, that Mongolia illegally expropriated the mining investments; Petitioners also asserted the claim was subject to arbitration under Article 8(3) of the Treaty and requested compensation.

Mongolia appeared in the arbitration. Like virtually every sovereign nation facing an investor dispute under a BIT, Mongolia asserted that Petitioners' claims were not subject to arbitration, in addition to disputing their merit. App. 11–12.

As is routine, once the tribunal was constituted, it held a conference with the parties to establish a framework and timetable under which the arbitration would proceed. Thereafter, on November 2, 2010, the tribunal issued Procedural Order #1 (the "Procedural Order"), a 59-paragraph order that prescribed a number of procedural matters, including the arbitrators'

compensation, the format of written submissions, the schedule for submissions and a hearing, matters related to document disclosure, and the arbitrators' selection of New York as the seat of arbitration. App. 56, 65; *see also id.*, at 74–76 ("Schedule of Arbitration"). Under a heading titled "Prehearing submissions," the Procedural Order also provided that, per Petitioners' and Mongolia's agreement, "the proceedings shall be divided into two phases, the first covering jurisdiction and liability, the second, if necessary, quantum [*i.e.*, damages]." App. 68. This separation of the damages phase from everything else is common in investor-state and other arbitrations. *See* pp. 15–16, below.

The parties made submissions and exchanged documents in line with the Procedural Order. Petitioners' written submissions invoked the tribunal's jurisdiction under Article 8(3) of the Treaty and presented their case on the merits. Mongolia's submissions challenged the tribunal's jurisdiction by arguing, among other things, that the tribunal lacked authority under the Treaty to determine whether Mongolia expropriated Petitioners' investments, and alternatively defended itself on the merits. In September 2015, the tribunal held a five-day evidentiary hearing.

The tribunal rendered its award nearly two years later, on June 30, 2017, concluding it did not have jurisdiction under the Treaty to consider whether an expropriation had occurred. Instead, the tribunal held, arbitration would have been available to Petitioners only if Mongolia formally proclaimed that it had committed an expropriation, and the dispute were limited

to the amount of compensation. The tribunal's award thus dismissed the claims on jurisdictional grounds.

II. Procedural History

A. Petitioners filed a petition in the U.S. District Court for the Southern District of New York in September 2017 to vacate the *ad hoc* tribunal's award and to compel Mongolia to submit to arbitration under the Treaty. On November 25, 2019, the district court rejected the petition in a published decision.

The district court acknowledged "the treaty itself does not contain clear and unmistakable evidence that the parties intended to place the question of arbitrability before the arbitrators." App. 47. Nevertheless, the court concluded that Petitioners, "by initiating this arbitration, affirmatively arguing for the tribunal's jurisdiction, and vigorously participating in the seven-year-long arbitration proceedings, have *waived* their opportunity to object now to the arbitrators' ability to decide arbitrability." App. 41 (emphasis added).

In view of this "waiver," the district court explained, "the parties clearly and unmistakably agreed to place the question of arbitrability before the tribunal." App. 41. The court then deferred to the arbitrators' jurisdictional ruling and denied relief.

B. The U.S. Court of Appeals for the Second Circuit affirmed the district court's judgment, also in a published opinion. In its decision, the Second Circuit, like the district court, acknowledged the Treaty itself provided no "clear and unmistakable" evidence of an

agreement to delegate questions of arbitrability to the arbitral tribunal. App. 16.

Nevertheless, the Second Circuit affirmed based on an argument neither party advanced. It held that Petitioners and Mongolia "expressed their intent to submit issues of arbitrability to arbitration" by agreeing, in a single sentence of the 59-paragraph Procedural Order, to an arbitration schedule that bifurcated the arbitration into (1) a jurisdiction and liability phase, and (2) a damages phase, if necessary. App. 16; *cf.* App. 68. According to the court of appeals, Petitioners' "conduct during the remainder of the arbitration . . . confirm[ed] their intent as expressed" in the Procedural Order, because the parties presented both jurisdictional and merits arguments to the arbitrators, and the arbitrators then addressed their jurisdiction. App. 16.

Petitioners filed a petition for rehearing *en banc*. The court of appeals denied that petition, and Petitioners now seek review by this Court.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW EFFECTIVELY OVERRULED *FIRST OPTIONS*

The decision below guts this Court's longstanding framework for how courts should determine "who has the primary power to decide arbitrability" in a dispute. *First Options*, 514 U.S., at 943.

It is well-settled that judges decide arbitrability questions *de novo* unless parties agree "to be effectively bound" by arbitrators' decisions on arbitrability, and thus to forego *de novo* judicial review of that question. *Id.*, at 946. But "[c]ourts should not assume that the parties agreed to arbitrate arbitrability unless there is *'clear and unmistakable' evidence* that they" so agreed. *Id.*, at 944 (cleaned up; emphasis added). Participation in an arbitration—including "arguing the arbitrability issue to an arbitrator"—"does not indicate clear willingness to arbitrate that issue." *Id.*, at 946.

The Second Circuit's decision below held the precise opposite. It stated that the parties, by agreeing to a schedule for making jurisdictional arguments in arbitration and then making those arguments, *did* show such intent. That flies in the face of the Court's instructions and completely undoes the judiciary's presumptive primacy in ruling upon arbitrability.

A. "[A]rbitration is simply a matter of contract between the parties; it is a way to resolve those disputes—but only those disputes—that the parties have

agreed to submit to arbitration." *Id.*, at 943. "If the contract is silent on the matter of who primarily is to decide 'threshold' questions about arbitration," including as to what disputes fall within the scope of an arbitration agreement, "courts determine the parties' intent with the help of presumptions." *BG Grp. PLC* v. *Republic of Argentina*, 572 U.S. 25, 34 (2014).

In line with that fundamental precept, courts approach the question at issue here—*i.e.*, who *primarily* decides arbitrability—differently from the question of whether a given merits dispute is arbitrable. While doubts concerning *whether* a merits dispute is arbitrable are resolved in favor of arbitration, *First Options*, 514 U.S., at 945, the presumption is reversed when it comes to addressing *who* primarily decides arbitrability: "courts presume that the parties intend courts, not arbitrators, to decide what we have called disputes about 'arbitrability,'" including questions about a tribunal's jurisdiction. *BG Grp.*, 572 U.S., at 34. The law reverses that presumption to ensure parties arbitrate those disputes (and only those disputes) they agreed to arbitrate; "[a] party often might not focus upon" the "rather arcane" who-decides issue" or "the significance of having arbitrators decide the scope of their own powers." *First Options*, 514 U.S., at 945. Thus, absent clear and unmistakable evidence of an agreement to have arbitrators render a binding decision on arbitrability, courts review arbitrability questions *de novo*.

As the Court has also made clear, a party does not agree to forsake the right to *de novo* judicial review of

arbitrability questions merely by participating in arbitration, or by arguing arbitrability to arbitrators. In *First Options*, it was not enough that the Kaplans had participated in arbitration and that they had "fil[ed] with the arbitrators a written memorandum [addressing] the arbitrators' jurisdiction." *Id.*, at 946. "[M]erely arguing the arbitrability issue to an arbitrator," the Court held, "does not indicate a clear willingness to arbitrate that issue, *i.e.*, a willingness to be effectively bound by the arbitrator's decision on that point." *Ibid.* That is because there is a difference between agreeing "to be effectively bound," *ibid.*, and "allowing the arbitrator to make an initial (but independently reviewable) arbitrability determination," *id.*, at 947.

B. The decision below flouted these core holdings and turned *First Options* on its head.

1. To begin, the decision below departed from *First Options*' express holding that arguing arbitrability to arbitrators is insufficient to forego the presumptively available *de novo* review by a court. The Second Circuit in the decision below held that Petitioners gave up the right to *de novo* review by agreeing to a schedule for the submission of jurisdictional objections. App. 16 ("The Parties agreed at the outset of the arbitration that the tribunal would hear jurisdictional issues at the first phase of arbitration, . . . This agreement 'clearly and unmistakably' evidences the Parties' intent."). But, as noted above, the Procedural Order reflects only that the parties "agreed that the proceedings shall be divided into two phases, the first cov-

ering jurisdiction and liability, the second, if necessary, quantum," App. 68, and that the parties would follow a schedule to make their arguments on these issues, App. 74–76 ("Schedule of Arbitration").

Plainly, there is no substantive difference between agreeing to a *schedule for filing* written memoranda addressing jurisdiction, which the Circuit said sufficed to show an agreement to arbitrate arbitrability, and actually "*filing* with the arbitrators a written memorandum [addressing] the arbitrators' jurisdiction," which *First Options* said did *not* suffice, 514 U.S., at 946 (emphasis added).

2. More fundamentally, the Second Circuit committed a profound conceptual error that undoes the entire *First Options* framework. Under the Circuit's approach, it is all but impossible for parties to avoid being deemed to have "agreed" to arbitrate arbitrability; the result is to render illusory *First Options*' presumption in favor of *de novo* judicial review of arbitrability questions. The *First Options* framework is based upon the key distinction between (1) "allowing the arbitrator to make an initial (but independently reviewable) arbitrability determination," and (2) agreeing "to be effectively bound" by an arbitrator's decision on arbitrability by allocating final authority to them. *Id.*, at 946–47. *First Options* and its progeny indeed speak of which tribunal, court or arbitrator, has "primary"—not exclusive—authority in that regard. *Id.*, at 943; *BG Grp.*, 572 U.S., at 34 (*First Options* addresses "the matter of who *primarily* is to decide 'threshold' ques-

tions about arbitration") (emphasis added). This necessarily assumes that arbitrators *will* hear and decide arbitrability questions, even where courts later review those questions (and their decisions) *de novo*.

This point on the concurrency of authority to address arbitrability may appear subtle, but it is critical. No matter whether there is an agreement to arbitrate arbitrability, all arbitrators *necessarily* have authority to consider their own jurisdiction when challenged, and parties will always take positions on the subject. An arbitration claimant necessarily takes the position that its claims are subject to arbitration simply by commencing arbitration (since they usually must expressly plead why a dispute is arbitrable). A respondent takes a position on arbitrability by objecting to jurisdiction (or not). Arbitrators take a position as well, at a minimum implicitly by issuing an award on the merits, and it is settled practice in international arbitration to expressly consider jurisdiction when raised as a defense. *See* pp. 14–15, below.

First Options' recognition of judicial primacy to finally resolve arbitrability questions thus turns on the critical distinction between "agreeing to be bound" by an arbitrator's decision on arbitrability, and allowing arbitrators to "make an *initial* decision" that is reviewed *de novo* (just as district courts make decisions about their own jurisdiction, subject to *de novo* review on appeal). Without that recognition of concurrent authority, there could never be *de novo* judicial review of arbitrability questions, because arbitrators must *always* determine their own jurisdiction.

The Second Circuit's decision disregards this point, and therefore elides the critical distinction between an arbitrator's "initial" ruling on arbitrability, on the one hand, and an arbitrator's ruling that the parties have agreed would be "binding," on the other. The Circuit explained that the parties' intent was clear and unmistakable because they "agreed at the outset of the arbitration that the tribunal would *hear* jurisdictional issues in the first phase of the arbitration," which intent was supposedly confirmed by the fact that they then tendered arguments on jurisdiction to the arbitrators. App. 16 (emphasis added). But it is just as likely the parties agreed to have the arbitrators provide an "initial" ruling on arbitrability (fully reviewable *de novo* in court) as one that is binding (subject to deferential review). Lack of clarity on that question, *First Options* instructs, means there is no clear-and-unmistakable agreement to arbitrate arbitrability, and judges must exercise *de novo* review. 514 U.S., at 946–47.

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First Options and its progeny recognize that private parties may agree to depart from the presumption of *de novo* judicial review for questions going to arbitrators' jurisdiction. That is because, the Court recognized, parties may agree to be bound by an arbitrator's ruling on arbitrability, and such an agreement will be enforced according to its terms. *Henry Schein, Inc.* v. *Archer & White Sales, Inc.*, 139 S. Ct. 524, 530 (2019) ("[P]arties may delegate threshold arbitrability questions to the arbitrator, so long as the parties'

agreement does so by 'clear and unmistakable' evidence") (emphasis added).

But there must be an actual agreement to arbitrate arbitrability—*i.e.*, to empower an arbitrator to issue a binding decision on arbitrability—as opposed to simply an agreement to proceed to arbitration. If the parties have agreed only to proceed to arbitration—in the course of which the parties and the arbitrator will necessarily take a position on arbitrability—the arbitrator's jurisdiction must be reviewed *de novo*. That is the whole point of *First Options*. And the decision below eviscerates it.

"A direct conflict between the decision of the court of appeals of which review is being sought and a decision of the Supreme Court is one of the strongest possible grounds for securing the issuance of a writ of certiorari." Stephen M. Shapiro et al., Supreme Court Practice 250 (10th ed. 2013); *see* Sup. Ct. R. 10(c) (factors in favor of certiorari include "a United States court of appeals . . . has decided an important federal question in a way that conflicts with relevant decisions of this Court"). The "direct" and "readily apparent" conflict between the Second Circuit's decision below and *First Options* plainly warrants certiorari. Shapiro, *supra*, Supreme Court Practice 251.

II. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE QUESTION PRESENTED IS EXCEEDINGLY IMPORTANT

New York is a global center for arbitration disputes, and by far the most common site for international arbitrations in the United States. By one count, more than half of U.S.-based international arbitrations are seated there, and the resulting awards are subject to Second Circuit law governing vacatur. The decision below is thus exceedingly important, as nothing remains of *First Options* in the Second Circuit.

For the reasons just explained in Point I, the decision below disrupts longstanding doctrine, and thereby materially upsets longstanding expectations of both domestic and international arbitration practitioners, and of contracting parties who selected New York as the seat for arbitrating their disputes.

As explained in this section, this Court's review is imperative given the importance of the question presented to arbitration practice and U.S. policy as reflected in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the "New York Convention"). *See* 9 U.S.C. §§ 201–208 (implementing the Convention). The decision below will also give rise to a plethora of practical problems. The Second Circuit's decision will engender confusion, disadvantage arbitration claimants in comparison to respondents, decrease the efficiency goals of arbitration, and increase pre-arbitration litigation.

A. The Circuit's decision below is exceedingly important for international arbitration—much of which is conducted in New York, *see* infra p. 17 n.4—providing reason enough to consider the question presented. *BG Grp.*, 572 U.S., at 32 ("BG Group filed a petition for certiorari. Given the importance of the matter for international commercial arbitration, we granted the petition.").

As the Circuit overlooked, arbitration tribunals *always* have the power to decide their own jurisdiction, even if a court will later do so again *de novo*. *See* Franco Ferrari, Friedrich Rosenfeld, & John Fellas, International Commercial Arbitration: A Comparative Introduction 47 (2021) ("As far as jurisdictional assessments by arbitral tribunals are concerned, there is a large consensus across jurisdictions that arbitral tribunals are competent to decide on their jurisdiction.").

To take a historical example, consider that one of the U.S. commissioners superintending the Jay Treaty arbitration after the American Revolution considered that the tribunal's authority to consider its own jurisdiction was "inherent" in the tribunal's "very constitution, and indispensably necessary to the discharge of any of its duties," while another opined that the tribunal must have the competence to determine its jurisdiction, otherwise the Jay Treaty arbitrators' powers would be "completely nominal and illusory." John Basset Moore, International Adjudications, Ancient and Modern: History and Documents 183, 196

(1931) (compilation of original opinions and related documents).

That historical example is in keeping with modern practice. Indeed, the issue of jurisdiction arises as a matter of course in international arbitration, particularly in investor-state disputes like this one.[2] Sovereign states as respondents will almost always dispute jurisdiction; investors will have no alternative but to respond; and arbitrators will have to decide the issue. Moreover, one study observes that up to two-thirds of investor-state disputes which it analyzed were subject to bifurcation into two stages, or divided even further, precisely what occurred here.[3] As a result, the practical implication of the Second Circuit's decision is that *de novo* review by judges of arbitrability will *never* be available in international arbitration proceedings situated in New York. That cannot be the law.

First Options, as noted above, provides a framework recognizing that arbitral tribunals must determine their own jurisdiction, at least in the first instance. Under *First Options*, the question is "who has the *primary* power to decide arbitrability," not whether arbitrators have *any* power at all concerning

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[2] Global Arbitration Review, The Guide to Investment Treaty Protection and Enforcement 22 (2021) ("Investors must first ensure that all of the jurisdictional requirements under the applicable [international investment agreements] are met.").

[3] *See* Daniel Behn, *Legitimacy, Evolution, and Growth in Investment Treaty Arbitration: Empirically Evaluating the State-of-the-Art*, 46 Geo. J. Int'l L. 363, 377 (2015) (noting "an analysis of the frequency of furcation can be a bit difficult" but estimating "up to 68%" of cases would be divided into stages).

arbitrability, 514 U.S., at 943 (emphasis added), because there is a distinction between parties agreeing to "be effectively bound" and allowing arbitrators to issue an "initial" decision on the subject. *Id.*, at 946–47. That distinction, consistently recognized by this Court (*see, e.g.*, *BG Grp.*, 572 U.S., at 34), conforms to international-arbitration practice. The decision below flouts this distinction. It therefore has the practical effect of overruling *First Options*' recognition of the concurrent jurisdiction of courts and arbitration tribunals.

B. The decision below also means that New York, globally a preferred venue for international-arbitration disputes, and by far the preferred location in the United States,[4] will be an outlier among international centers for arbitration, providing another important reason to grant the petition.

The United States has an important interest in ensuring that international-arbitration agreements and awards are treated the same in the United States and

[4] By one count, the leading sites for resolving international-arbitration disputes, other than New York, are the following: London, Singapore, Hong Kong, Paris, Geneva, Beijing, Shanghai, Stockholm, and Dubai. *See* Queen Mary University of London School of International Arbitration, 2021 International Arbitration Survey: Adapting Arbitration to a Changing World 6 (2021); *see also* New York International Arbitration Center, *New York Strong as Preferred Seat of International Arbitration* (Sept. 21, 2021) ("New York displaced Singapore to rank as the fourth most popular seat for [International Chamber of Commerce] arbitrations, preceded by Paris, London, and Geneva. Of the 88 [ICC] cases seated in the U.S., 49 were in New York, a record high at 55.6 percent, with the remainder in various locales.").

abroad. A "principal purpose underlying American adoption and implementation" of the New York Convention, incorporated into U.S. law via Chapter 2 of the Federal Arbitration Act, 9 U.S.C. §§ 201–208, was "to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). The decision below, which will govern judicial review of arbitrability decisions in cases involving both confirmation and vacatur of awards within the Second Circuit,[5] flouts that purpose, rendering this Court's intervention all the more important. *Cf. Monasky* v. *Taglieri*, 140 S.Ct. 719, 727 (2020) ("Our conclusion . . . is bolstered by the views of our treaty partners[.]").

Other centers for international arbitrations provide for *de novo* judicial review of arbitrability decisions. In England and Wales, for instance, an arbitrating party "may challenge any resulting award on jurisdictional grounds with *de novo* judicial consideration of those grounds," even after arbitrators rule on their own jurisdiction. Gary B. Born, International Commercial Arbitration 1304–05 (3d ed. 2021). *See* English Arbitration Act 1996, §§ 30, 31, 67. The same is true of France, where "[i]t is clear that the review of a jurisdictional award by French courts is *de novo*." Born, *supra*, at 1206 & n.374 (collecting cases).

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[5] The *First Options* framework governs vacatur of domestic awards and Convention awards rendered in the United States, *BG Grp.*, 572 U.S. at 33, as well as recognition and enforcement proceedings involving Convention awards. *LLC SPC Stileks* v. *Republic of Moldova*, 985 F.3d 871, 878 (D.C. Cir. 2021).

Thus, a party seeking to annul an arbitral award in French court "can expect the court to address [arbitrability] challenges without any deference to jurisdictional findings the arbitral tribunal may have previously made," even where the issue was disputed in arbitration and the arbitrators reached a decision on the subject. George A. Bermann, *The "Gateway" Problem in International Commercial Arbitration*, 37 Yale J. Int'l L. 1, 19 (2012).

The rule is to the same effect in the majority of countries that are the most popular arbitration centers in the world, including Switzerland, Singapore, and Sweden. *See, e.g.*, Swiss Law on Private International Law art. 190(2)(b) (providing for set aside of arbitral awards "where the arbitral tribunal wrongly accepted *or denied* jurisdiction (emphasis added)); *PT Tugu Pratama Indonesia* v. *Magma Nusantara Ltd*, [2003] SGHC 204, ¶18 (Singapore High Ct.) ("[T]he court makes an independent determination on the issue of jurisdiction and is not constrained in any way by the findings or the reasoning of the tribunal."); Swedish Arbitration Act 1999, § 36.[6]

Given the conflict in the result that would obtain as between New York and the other leading centers for international arbitration, and the key U.S. interest in uniformity with respect to the issue, see *Scherk*, 417 U.S., at 516, this Court's intervention is needed.

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[6] *See generally*, Born, *supra*, at 1213 (discussing judicial review of arbitrators' jurisdictional decisions under Swiss law); *id.*, at 1199 (Singapore); *id.*, at 1309–11 (Sweden).

The facts of this case underscore the point: consider that the parties did not select New York as the arbitral seat. In the Procedural Order the Second Circuit relied upon, the tribunal observed that Petitioners had "expressed a preference for Stockholm or Geneva," while Mongolia had "expressed a preference for Singapore;" because both parties indicated they "would consent to New York," the tribunal, not the parties, "designated New York," App. 65. In Sweden, Switzerland, and Singapore, a court would have reviewed arbitrability *de novo*. On the facts of this case and others like it, there is plainly a federal interest in having a federal court in New York proceed similarly.

C. The case also implicates additional foreign-policy concerns warranting this Court's review. It involves a dispute between foreign state-owned entities, as investors, and a foreign state. And it concerns matters arising under a bilateral investment treaty, making this "a matter of particular concern to the United States," as the United States itself "is a party to many international agreements that authorize investor-state arbitration." Brief for the United States as Amicus Curiae Supporting Petitioners at 2, *ZF Automotive US, Inc.* v. *Luxshare, Ltd.*, Nos. 21-401 & 21-518 (Jan. 31, 2022). Indeed, the United States is a party to more than fifty bilateral investment treaties, including with its most-significant trading partners, meaning U.S. investors and the United States itself (when it is a re-

spondent) would lose the right to *de novo* review of jurisdictional decisions as a matter of course under the reasoning below.[7]

By holding that Petitioners, which include two foreign state-owned enterprises, and Mongolia, a foreign sovereign, forfeited their right to *de novo* judicial review of the tribunal's jurisdictional determination because they consented to a commonplace procedural order, the decision below "trivializes the significance to a sovereign nation of subjecting itself to arbitration anywhere in the world[.]" *BG Grp.*, 572 U.S., at 51 (Roberts, C.J., dissenting).

D. Certiorari is also warranted because the decision below will lead to a host of practical problems and perverse incentives, as it will transform international (and domestic) arbitration practice in New York, introducing uncertainty and confusion into arbitrations and multiplying litigation proceedings.

In the decision below, the Circuit effectively transformed into a waiver analysis what previously was always a question about "whether a party has *agreed* that arbitrators should decide arbitrability," *First Options*, 514 U.S., at 944 (emphasis added)—*i.e.*, whether "parties . . . *agree[d] by contract* that an arbi-

[7] U.S. Department of State, United States Bilateral Investment Treaties, https://www.state.gov/investment-affairs/bilateral-investment-treaties-and-related-agreements/united-states-bilateral-investment-treaties (last visited March 11, 2022).

trator, rather than a court, will resolve threshold arbitrability questions," *Schein*, 139 S. Ct., at 527 (emphasis added).

The necessary result of the Circuit's decision—that a party foregoes *de novo* judicial review by making arguments to an arbitrator about arbitrability—is that parties will be incentivized to launch pre-arbitration or parallel litigation as a matter of course. *Davis* v. *Chevy Chase Fin. Ltd.*, 667 F.2d 160, 168 (D.C. Cir. 1981) (limiting post-award review of arbitrability "might actually foster litigation by requiring parties to seek 'interlocutory' review of jurisdictional rulings").

Respondents in arbitration who wish to ensure that they preserve *de novo* review of their jurisdictional objections will have the incentive to seek a judicial stay of an arbitration proceeding, or to commence full-blown litigation of the dispute, or else to refuse to arbitrate and thus trigger court proceedings by the claimant, in each case prolonging the dispute, wasting judicial and party resources, and requiring judicial attention where none would otherwise be needed. *E.g.*, *China Minmetals Materials Import & Export Co.* v. *Chi Mei Corp.*, 334 F.3d 274, 281 (3d Cir. 2003) (post-award case under New York Convention: "if Minmetals had initiated proceedings in the district court to compel arbitration, the court would have been obligated to consider Chi Mei's allegations that the arbitration clause was void").

Claimants will have much the same incentive. To protect the right to *de novo* judicial review on the back

end, claimants will need to bring a motion to compel arbitration in court in the first instance, rather than commence the agreed-upon arbitration. 9 U.S.C. § 4; *see Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 219 (1985) ("[A] court must compel arbitration of otherwise arbitrable claims, when a motion to compel arbitration is made.").

And this course may not even be available to claimants. In the Second Circuit, judicial intervention is unavailable unless the respondent actually refuses to arbitrate. *E.g.*, *LAIF X SPRL* v. *Axtel S.A. de C.V.*, 390 F.3d 194, 196 (2d Cir. 2004) (once arbitration joined, courts cannot issue "an order compelling" a respondent "to arbitrate, *i.e.*, to do what it was doing"); *Associated Brick Mason Contractors* v. *Harrington*, 820 F.2d 31, 38 (2d Cir. 1987) (cause of action to compel arbitration accrues when party "unequivocally refuses" demand for arbitration). In other words, claimants may have no practical ability at all to preserve the right to obtain *de novo* judicial review, despite *First Options* giving courts presumptive primacy in resolving arbitrability disputes, and holding that there must be an agreement by contract to forego this. The Second Circuit's ruling to the contrary not only flouts *First Options*, but results in an unfair disparity, treating claimants and respondents differently.

E. Ultimately, this will all undermine the arbitration process, contravening well-recognized federal policy favoring arbitration.

That is not just because the Second Circuit's rule will lead to unnecessary litigation. More fundamentally, it undermines the foundation of arbitration: consent. *See, e.g.*, *BG Grp.*, 572 U.S., at 46 (Sotomayor, J., concurring) ("Consent is especially salient in the context of a bilateral investment treaty.") The Federal Arbitration Act's "basic purpose is to 'ensure *judicial* enforcement of privately made agreements to arbitrate'" according to their terms, so that parties arbitrate "those disputes—but *only* those disputes"—that are actually arbitrable. *First Options*, 514 U.S., at 943, 945 (emphases added).

The Second Circuit's de facto reversal of *First Options* will disincentivize parties from entering into arbitration agreements in the first place. As the Court first recognized in the labor-arbitration cases on which *First Options* was predicated, "[t]he willingness of the parties to enter into agreements that provide for the arbitration of specified disputes would be 'drastically reduced,' … if a[n] arbitrator had the 'power to determine his own jurisdiction'" conclusively. *AT&T Techs., Inc.* v. *Commun. Workers of Am.*, 475 U.S. 643, 651 (1986) (citations omitted).

III. SUMMARY REVERSAL IS WARRANTED

In the alternative to full briefing and argument, this Court should summarily reverse the decision below for disregarding *First Options* and its progeny. *See Gonzalez* v. *Thomas*, 547 U.S. 183, 185 (2006) (summary reversal warranted where court of appeals' "error is obvious in light of" a prior case from this Court).

First Options plainly held that "merely arguing the arbitrability issue to an arbitrator does not indicate a clear willingness to arbitrate that issue, that is, a willingness to be effectively bound by the arbitrator's decision on that point." 514 U.S., at 946. Yet in this case the Second Circuit held that Petitioners agreed to arbitrate arbitrability and be bound by the arbitrators' arbitrability ruling merely because they "agreed that the first phase of the arbitration would cover jurisdictional and liability disputes"—in other words, they agreed to a scheduling order. App. 20.

"[T]he decision of the court of appeals clearly fails to apply prior Supreme Court decisions," and a summary reversal is therefore warranted. Shapiro, *supra*, Supreme Court Practice 251.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the court of appeals should be summarily reversed, with instructions for the courts below to consider arbitrability *de novo*.

Respectfully submitted,

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March 11, 2022

APPENDIX

APPENDIX

TABLE OF CONTENTS

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 19-4191

[Filed: August 26, 2021]

August Term 2020

(Argued: February 18, 2021 Decided: August 26, 2021)

BEIJING SHOUGANG MINING INV. CO., LTD., CHINA HEILONGJIANG INT'L ECON. & TECH. COOP. CORP., QINHUANGDAOSHI QINLONG INT'L INDUS. CO. LTD.,	)
Petitioners-Appellants,	)
-v.-	)
MONGOLIA,	)
Respondent-Appellee.	)

Before: LIVINGSTON, *Chief Judge*, CHIN, and BIANCO, *Circuit Judges.*

Beijing Shougang Mining Investment Company, Ltd., China Heilongjiang International Economic & Technical Cooperative Corporation, and Qinhuangdaoshi Qinlong International Industrial

Company Ltd. (collectively, "Petitioners-Appellants") appeal from the November 25, 2019 order of the U.S. District Court for the Southern District of New York (Ramos, *J.*) denying their petition to set aside an arbitral award issued by an *ad hoc* arbitral tribunal constituted under a bilateral investment treaty between Mongolia and the People's Republic of China, and granting Respondent-Appellee Mongolia's cross-petition to confirm the award. Petitioners-Appellants further challenge the district court's rejection of their petition to compel arbitration on the merits. On appeal, Petitioners-Appellants' primary argument is that the district court erred by declining to review the arbitrability of their investment claims *de novo* before rejecting Petitioners-Appellants' petitions and confirming the arbitral award.

We reject the appeal and hold that Petitioners-Appellants were not entitled to *de novo* review of the arbitrability of their investment claims. While the bilateral investment treaty in this case does not contain a clear statement empowering arbitrators to decide issues of arbitrability, we hold that Petitioners-Appellants and Respondent-Appellee Mongolia (collectively, the "Parties") nonetheless "clear[ly] and unmistakabl[y]" agreed to submit questions of arbitrability to the arbitral tribunal in the course of the dispute between them. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (alterations and internal quotation marks omitted). First, the Parties reached an agreement at the outset of the arbitration, as confirmed by the arbitral tribunal in its first procedural order, providing that the tribunal would hear jurisdictional issues during a combined

jurisdictional and liability phase. In doing so, the Parties agreed to submit issues of arbitrability to the arbitral tribunal in the first instance. Second, Petitioners-Appellants' conduct throughout the remainder of the arbitration further confirms, and in no way casts doubt on, their intent as expressed in that agreement to submit arbitrability issues to the arbitral tribunal. We therefore conclude that the district court properly declined to determine independently the arbitrability of Petitioners-Appellants' investment claims. We further conclude that in reaching their decision on arbitrability, the arbitrators did not exceed their powers, and thus agree with the district court's decision to confirm the award. Accordingly, we AFFIRM.

FOR PETITIONERS-APPELLANTS:	S. CHRISTOPHER PROVENZANO (Michael A. Granne, J.J. Gass, *on the brief*), Provenzano Granne & Bader LLP, New York, NY.
FOR RESPONDENT-APPELLEE:	MICHAEL NOLAN (Kamel Aitelaj, *on the brief*), Milbank LLP, Washington, D.C.

DEBRA ANN LIVINGSTON, *Chief Judge*:

Beijing Shougang Mining Investment Company, Ltd., China Heilongjiang International Economic & Technical Cooperative Corporation, and Qinhuangdaoshi Qinlong International Industrial Company Ltd. (collectively, "Petitioners-Appellants") filed a petition in the U.S. District Court for the

Southern District of New York in September 2017 seeking to set aside an arbitral award (the "Award") resulting from an arbitration initiated by Petitioners-Appellants against Respondent-Appellee Mongolia ("Mongolia") under the 1991 bilateral investment treaty (the "Treaty") between Mongolia and the People's Republic of China (the "PRC").[1] The subject of the arbitration was the alleged expropriation by Mongolia of certain investments made by Petitioners-Appellants prior to 2006 in an iron-ore mine located in a north-central province of Mongolia. After more than seven years of proceedings, an *ad hoc* arbitral tribunal constituted under the Treaty, and seated in New York, determined that it lacked jurisdiction over Petitioners-Appellants' claims of expropriation, bringing the arbitration to a close. Shortly thereafter, Petitioners-Appellants proceeded to the Southern District, where they petitioned the district court to set aside the Award and to compel a return to arbitration. On November 19, 2019, the district court (Ramos, *J.*) denied Petitioners-Appellants' petition to vacate the Award and motion to compel arbitration, and granted Mongolia's cross-petition to confirm the Award.

On appeal, Petitioners-Appellants argue that Mongolia and Petitioners-Appellants themselves (collectively, the "Parties") did not "clearly and unmistakably" agree to submit issues of "arbitrability"

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[1] *See* Agreement Between the Government of the People's Republic of China and the Government of the Mongolian People's Republic Concerning the Encouragement and Reciprocal Protection of Investments, Aug. 26, 1991.

to arbitration and, therefore, that the district court erred by failing to conduct a *de novo* review of the arbitral tribunal's decision on arbitrability. They further argue that the arbitrators exceeded their powers and that the district court should not have confirmed the Award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. IV, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 ("New York Convention"), and the Federal Arbitration Act ("FAA"), 9 U.S.C. § 201 *et seq*.

For the reasons stated below, we disagree. The arbitral agreement at issue in this case—a bilateral investment treaty between Mongolia and the PRC—does not itself contain a clear statement empowering arbitrators to decide issues of arbitrability. Nonetheless, we hold that Petitioners-Appellants indisputably put the issue of the arbitrability of their claims to the arbitral tribunal when they consented, along with Mongolia, to the arbitration proceeding in two phases, with a combined jurisdictional and liability phase and, if necessary, a quantum phase. In doing so, the Parties agreed to submit arguments as to the appropriate reach of the arbitrators' jurisdiction over Petitioners-Appellants' claims under the Treaty to the arbitral tribunal. The Parties reached such agreement, moreover, after it had already become clear that the key jurisdictional issue to be argued during the first phase was the scope of the arbitration clause provided in the Treaty, and whether that clause is limited to disputes about compensation, a question clearly implicating "arbitrability." Consequently, we hold that the record supplies "clear

and unmistakable" evidence of the Parties' intent to arbitrate issues of arbitrability.

In light of this determination, we decline independent review of the arbitral tribunal's determination as to the appropriate interpretation of Article 8(3) of the Treaty, and instead review the Award with deference. We conclude that the arbitrators did not exceed their powers in construing the scope of the arbitral agreement, and thus that the Award is not subject to vacatur under the New York Convention or the FAA. We also find no error in the district court's decision to deny Petitioners-Appellants' request to compel arbitration on the merits. Accordingly, we AFFIRM the order of the district court.

BACKGROUND

I.

In 1991, Mongolia (then known as the "Mongolian People's Republic") and the PRC concluded a bilateral investment agreement concerning "the encouragement and reciprocal protection of investments."[2] J. App'x at 16. This agreement provides certain guarantees for the investors of each country when making investments in the other, including fair and equitable treatment and most favorable treatment for investments, restrictions on expropriation, and guarantees for the cross-border transfer of investments. Article 8 of the Treaty contains a dispute-resolution provision applicable to disputes between one of the sovereign states and investors from the other. Specifically, Article 8(3)

[2] We draw the following factual background from the Award.

provides that "[i]f a dispute involving the amount of compensation for expropriation cannot be settled within six months after resort to negotiations . . . , it may be submitted at the request of either party to an ad hoc arbitral tribunal." Treaty art. 8(3).

Petitioners-Appellants are state-owned and private enterprises incorporated in the PRC. In 2002, Qinhuangdaoshi Qinlong International Industrial Company Ltd. ("Qinlong") formed a joint venture with a Mongolian partner to develop an iron-ore mine in north-central Mongolia. Beijing Shougang Mining Investment Company, Ltd. and China Heilongjiang International Economic & Technical Cooperative Corp. purchased equity in the joint venture from Qinlong in 2004, and the joint venture acquired the Mongolian partner's license to exploit iron ore at the mine in 2005.

Beginning in the early 2000s, Mongolia undertook a series of measures in relation to the joint venture's operations, ultimately leading to the revocation of the venture's extracting license in 2006. The joint venture thereafter sued in the Mongolian courts, appealing its case as far as the Supreme Court of Mongolia, where it ultimately lost. After a series of additional lawsuits against the Mongolian government, the license and land-use rights to the iron-ore deposit were granted to a Mongolian corporation.

In 2010, Petitioners-Appellants initiated arbitration against Mongolia under Article 8 of the Treaty, claiming that Mongolia had interfered with their investment in the mine, and that such interference amounted to expropriation. In their request for arbitration, served on Mongolia in February 2010,

Petitioners-Appellants set out their claims under the Treaty as well as under Mongolia's foreign investment law,[3] arguing that both sets of claims were subject to arbitral jurisdiction. In particular, Petitioners-Appellants maintained that jurisdiction under Article 8(3) was "not limited to an assessment of the compensation due for an expropriation," but instead, that the provision "g[ave] the Arbitral Tribunal jurisdiction to determine the existence of an expropriation under Article 4 of the Treaty and its lawfulness as well as any compensation due." J. App'x at 186. The Parties thereafter made their respective arbitrator appointments , and the International Centre for Settlement of Investment Disputes ("ICSID") appointed the president of the arbitral tribunal, in accordance with the procedures set out in the Treaty.

Shortly after the tribunal was constituted, the arbitrators called for a procedural meeting to discuss the organization of the arbitral proceedings. According to the terms of the Treaty, arbitrations under Article 8(3) are "*ad hoc*," meaning that no arbitral institution is selected for administration of the arbitration, and that arrangements as to procedures must be made during the arbitration itself.[4] Counsel for the Parties

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[3] Petitioners-Appellants later limited their claims to those under the Treaty, dropping their reliance on Mongolia's foreign investment law.

[4] As a leading treatise explains, "*[a]d hoc* arbitrations are not conducted under the auspices or supervision of an arbitral institution. Instead, parties simply agree to arbitrate, without designating any institution to administer their arbitration." 1 Gary Born, *International Commercial Arbitration*149 (2009).

were present at that meeting, which was held by the tribunal on October 1, 2010 in New York. On November 2, 2010, the tribunal issued its "Procedural Order No. 1," which set out a number of key provisions of the arbitration, as well as recounted key aspects of the first procedural meeting and agreements reached at it. The procedural order began by recounting that the "parties confirmed that the Tribunal had been properly constituted" under the Treaty. J. App'x at 195. The order then indicated that, in the absence of any language in the Treaty specifying the juridical seat of the arbitration, the seat of the arbitration would be New York, New York, a designation to which both Parties consented. J. App'x at 198.

With respect to the rules governing the arbitration, the procedural order further recounted that Article 8(5) of the Treaty "authorizes the Tribunal to determine its own procedure" and that, at the same time, "'the Tribunal may, in the course of determination of procedure, take as guidance the [ICSID's] Arbitration Rules . . . .'" J. App'x at 199. In relation to the issue of procedures, Petitioners-Appellants proposed, but Mongolia did not agree, that the tribunal should adopt the revised United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules to govern the proceedings. The tribunal resolved this disagreement by explaining that, "given the statement in the Treaty that the tribunal may, if it

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Nonetheless, the parties may select a preexisting set of procedural rules to govern the arbitration, such as the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules. *Id.* at 149-50.

thinks it appropriate, refer to the ICSID Rules as guidance on questions of procedure," it "s[aw] no reason" to adopt a set of institutional rules at the outset of the proceedings. J. App'x at 199. Instead, the tribunal noted that it "expect[ed] that should it be called upon to rule on any procedural issue, the parties will bring to its attention such guidance from the ICSID Rules, the UNCITRAL Rules, or other authorities as they deem appropriate."[5] *Id.*

Finally, and most importantly in the context of the present dispute, the procedural order also set out key parameters for how the arbitration would proceed. With respect to written submissions to be made before the arbitral hearing, the tribunal recounted that "[t]he parties have agreed that the proceedings shall be divided into two phases, the first covering jurisdiction and liability, the second, if necessary, quantum." J. App'x at 199. The tribunal thereafter set out dates for the submission of briefs ("memorials") and exhibits prior to the first hearing.

The arbitration continued for seven years. In March 2011, Petitioners-Appellants submitted their memorial in which they invoked the jurisdiction of the tribunal under Article 8(3) of the Treaty and argued that, under their interpretation, the tribunal possessed jurisdiction over their claims. Specifically, they argued that Article 8(3) confers subject matter jurisdiction (referred to as

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[5] Procedural Order No. 1 also indicated that the Parties consented to appoint the Permanent Court of Arbitration as the administrator of the arbitral proceedings for purposes of assisting with the financial aspects of the arbitration proceedings, as well as with hosting hearings.

jurisdiction "*ratione materiae*") "over disputes involving the existence and lawfulness of the expropriation of [their] investments, as well as the reparation to be granted to [them]." J. App'x at 231. Petitioners-Appellants further argued that a narrow reading of Article 8(3), requiring Petitioners-Appellants to first obtain a decision as to Mongolia's liability for the alleged expropriation from a national court or administrative tribunal before resorting to arbitration, is inconsistent with other features of Article 8, including a fork-in-the-road provision in Article 8(3). In their view, the tribunal must have jurisdiction to decide both whether an expropriation took place and the amount of any resulting reparations.

Mongolia took the opposite tack in its counter-memorial filed in September 2011, objecting to the tribunal's jurisdiction over Petitioners-Appellants' claims on the ground that, in its view, Article 8(3) confers jurisdiction only over disputes about the "quantum of compensation for expropriation" after an expropriation has been determined outside of arbitration.[6] J. App'x 406. Petitioners-Appellants filed

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[6] Mongolia further argued, *inter alia*, that the tribunal lacked jurisdiction because, in its view, Petitioners-Appellants' investment was procured by theft, embezzlement, and fraud, Petitioners -Appellants' claims amounted to an "impermissible appeal" of Mongolian judicial decisions finding corruption and fraud, J. App'x at 400, the investment at issue did not incur a "real investment risk" and therefore fell outside the protection of the Treaty, J. App'x at 419, and Petitioners-Appellants had already availed themselves of judicial resolution in Mongolian courts . Mongolia also made counterclaims against Petitioners-Appellants relating to these issues.

a reply memorial in June 2012, responding to Mongolia's jurisdictional objections and reiterating its argument as to the scope of Article 8(3), while Mongolia filed a rejoinder in December 2012.

In September 2015, the tribunal held hearings at the Permanent Court of Arbitration in The Hague, Netherlands.[7] On June 30, 2017, the tribunal rendered its award in New York. The tribunal held that it lacked subject matter jurisdiction under the Treaty to entertain Petitioners-Appellants' claims. Award at 140-148, 152. The tribunal began its reasoning by observing that the entirety of its jurisdiction was founded on Article 8(3), which conferred jurisdiction over "dispute[s] involving the amount of compensation for expropriation." *Id.* at 143. Looking to the ordinary meaning of that clause and its place within the Treaty, the tribunal concluded that Article 8 did not require Mongolia to arbitrate the issue of whether an expropriation had occurred, but only the amount of compensation due. In its view, the clause "dispute involving the amount of compensation for

[7]As discussed in Part I.B, the tribunal also issued its "Procedural Order No. 5" on October 6, 2012. In this order, the tribunal recounted that Petitioners-Appellants submitted a letter to the tribunal on August 31, 2012, toward the close of briefing, requesting that the tribunal "remind the parties that any award rendered by the Tribunal is final and binding and that the parties should not, directly or indirectly, take any steps that may undermine or affect the enforceability of the award." Mem. of Law in Opp'n to (1) Pet'rs' Pet. to Vacate Arbitral Award & (2) In Supp. of Resp'ts' Cross-Pet. to Confirm Arbitration Award, Attach. 8. The tribunal ultimately declined to issue such a "reminder" on the basis that Petitioners-Appellants had not presented the tribunal with a specific dispute or issue requiring it to do so. *Id.*

expropriation" limits the jurisdiction of an arbitral tribunal to disputes over whether compensation owed "is equivalent to the value of the expropriated investments at the time when expropriation is proclaimed." *Id.* at 145. In other words, arbitral jurisdiction extends only to "cases where an expropriation has been formally proclaimed" and the amount to be paid is disputed. *Id.* at 146.

The tribunal therefore held that it lacked jurisdiction over Petitioners-Appellants' claims in the absence of any documentation from a Mongolian court or other administrative body that an expropriation had occurred. The arbitration thus reached its end.

II.

On September 28, 2017, Petitioners-Appellants filed a petition in the U.S. District Court for the Southern District of New York seeking to set aside the Award, *see* 9 U.S.C. § 10(a)(4) (providing that a federal court may vacate an arbitral award "where the arbitrators exceeded their powers"), and compel arbitration of the merits of the dispute, *see id.* § 4. Mongolia opposed the petition and cross-petitioned to confirm the Award. *See id.* §§ 204, 207 (providing that a party may move "for an order confirming [an arbitral] award," *id.* § 207, in a federal court of the "place designated in the agreement as the place of arbitration if such place is within the United States," *id.* § 204); New York Convention art. IV (providing that a party may apply "for recognition and enforcement" of an arbitral award subject to the Convention). Petitioners-Appellants' main argument was that the district court should review the arbitral tribunal's decision as to jurisdiction

de novo "[b]ecause the Treaty does not explicitly assign the question of arbitrability to the Tribunal." Pet. to Vacate Arbitral Award Declining to Exercise Arbitral Jurisdiction and Compel Arbitration, at 2. In their view, "unless the relevant arbitration agreement . . . clearly and unmistakably commits the question of an arbitral tribunal's jurisdiction to that tribunal, the arbitrability of a claim is a matter of law for a court to determine independently, without deference to the arbitrators' decision." *Id.* Petitioners-Appellants further argued that upon review of the tribunal's decision on jurisdiction, the court should vacate the Award because the arbitrators arrived at an incorrect interpretation of the scope of Article 8(3) of the Treaty. They maintained that the tribunal's interpretation was "an extremely narrow construction" of Article 8(3) of the Treaty that "defeats the purpose of investor-state arbitration." *Id.* at 10.

Mongolia responded that the dispute over Article 8(3) did not concern a question of arbitrability mandating *de novo* review and that, in the alternative, the Parties agreed to submit the issue to the arbitrators. Mongolia pointed to Petitioners-Appellants' submissions before the tribunal arguing for their preferred interpretation of Article 8(3), as well as Petitioners-Appellants' failure to argue during the arbitration that the tribunal lacked the competence to determine its own jurisdiction. Mongolia concluded that because Petitioners-Appellants also did not meet their burden of proving that the Award should be vacated under the New York Convention or the FAA, the district court should confirm the Award.

On November 19, 2019, the district court (Ramos, *J.*) denied Petitioners-Appellants' petition to vacate the Award and motion to compel arbitration, and granted Mongolia's cross-petition to confirm the Award. In explaining its decision not to review the Award's decision on jurisdiction *de novo*, the district court reasoned that "the treaty itself does not contain clear and unmistakable evidence that the parties intended to place the question of arbitrability before the arbitrators," particularly because it does not designate arbitral rules to govern the arbitration that suggest arbitrators have the power to rule on objections that they have no jurisdiction. Sp. App'x at 6. Nonetheless, the district court explained that "the [Petitioners-Appellants'] behavior during the arbitration d[id]" provide "clear and unmistakable" evidence of Petitioners-Appellants' intent to arbitrate issues of arbitrability. *Id.* As the district court recognized, Petitioners-Appellants "initiated the arbitration and argued for the arbitrators' jurisdiction from their very first submission." *Id.* at 8. On that basis, the district court held that Petitioners-Appellants were not entitled to independent review of the Award.

Proceeding to deferential review, the district court confirmed the Award. Construing Petitioners-Appellants' arguments concerning the accuracy of the arbitrators' interpretation of Article 8(3) as a petition to vacate the award under § 10(a)(4) of the FAA, the district court concluded that Petitioners-Appellants had not met their burden to show that the arbitrators "exceeded their powers." *Id.* at 10. This appeal followed.

DISCUSSION

Petitioners-Appellants argue that the district court erred by failing to independently review the arbitral tribunal's decision on jurisdiction before rejecting their petitions and confirming the Award. Mongolia, for its part, contends that the district court properly engaged in deferential review of the Award. For the reasons stated below, we reject Petitioners-Appellants' arguments. We agree with the district court that the Treaty in this case does not supply "clear and unmistakable" evidence that the Parties intended to submit arbitrability issues to arbitration. Nonetheless, we find that the Parties "clearly and unmistakably" expressed their intent to submit issues of arbitrability to arbitration. The Parties agreed at the outset of the arbitration that the tribunal would hear jurisdictional issues in the first phase of the arbitration, after it had become clear that the key jurisdictional issue to be argued was the scope of the Treaty's arbitration clause, a question clearly implicating "arbitrability." This agreement "clearly and unmistakably" evidences the Parties' intent. Petitioners-Appellants' conduct during the remainder of the arbitration, moreover, confirms their intent as expressed in that agreement, and in no way casts doubt on it. We therefore review the Award with deference and affirm the district court's decision to confirm the Award, as well as its denial of Petitioners-Appellants' request to compel arbitration on the merits.

I.

We begin with the question of whether the district court was required to independently review the

tribunal's determination of the arbitrability of the dispute as expressed in the Award. We evaluate the district court's decision on this issue *de novo*. *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 71 (2d Cir. 2012).[8]

"The question [of] whether the parties have submitted a particular dispute to arbitration, *i.e.*, the question of arbitrability, is an issue for judicial determination unless the parties clearly and unmistakably provide otherwise." *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002) (internal quotation marks, emphasis, and alteration omitted); *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 296 (2010). The concept of "arbitrability" "include[s] questions such as 'whether the parties are bound by a given arbitration clause,' or 'whether an arbitration clause in a concededly binding contract applies to a particular type of controversy.'" *BG Grp. PLC v. Republic of Argentina*, 572 U.S. 25, 34 (2014) (quoting *Howsam*, 537 U.S. at 84)); *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 651 (1986) (holding that it was for the court to decide whether a particular labor dispute fell within the arbitration clause of a collective-bargaining agreement); *Schneider*, 688 F.3d at 71 ("'Question[] of arbitrability' is a term of art covering 'dispute[s] about whether the parties are bound by a given arbitration clause' [*i.e.*, formation] as well as 'disagreement[s] about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy' [*i.e.*, scope]." (quoting

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[8] We have jurisdiction over this matter pursuant to 28 U.S.C. § 1291.

Republic of Ecuador v. Chevron Corp, 638 F.3d 384, 393 (2d Cir. 2011) (alterations in original))).[9]

At the start, Petitioners-Appellants maintain that the question of whether Article 8(3) of the Treaty provides jurisdiction over their claims constitutes a dispute about "arbitrability." Mongolia, on the other hand, objects that the dispute over jurisdiction addressed by the tribunal was not in fact a dispute about "arbitrability," as the Parties had already consented to arbitration under the Treaty, and that in any case, the matter was put to the arbitrators.

We agree with Petitioners-Appellants that the issue of whether Article 8(3) of the Treaty reaches Petitioners-Appellants' claims for expropriation does in fact constitute a dispute about "arbitrability." In this case, the core dispute between the Parties, and on which the tribunal concluded that it lacked jurisdiction over Petitioners-Appellants' claims, concerns the appropriate reading of the language "dispute[s] involving the amount of compensation for expropriation, "and in particular, whether that clause provides arbitral jurisdiction over only disputes about the amount of compensation rather than whether

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[9] For purposes of clarity, and in response to confusion revealed in the briefing, we note that the definition of "arbitrability" in our case law differs from that of some foreign jurisdictions, where "arbitrability" may refer to whether an issue is permitted by law to be resolved by arbitration, notwithstanding the agreement of the parties. *See* 1 Born, *International Commercial Arbitration* , at 766-68 (suggesting that in certain foreign jurisdictions, disputes involving criminal matters and domestic relations subjects are often deemed "nonarbitrable").

compensation is owed. As Petitioners-Appellants' claims are not viable unless they fall within this clause, this issue undoubtedly concerns arbitrability. *Schneider*, 688 F.3d at 71 (explaining that the concept of "arbitrability" includes "disagreements about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy" (internal quotation marks and alterations omitted)). Under our case law, the district court was therefore required to review the tribunal's decision *de novo* unless the record supplies "clear and unmistakable evidence" that the Parties agreed to submit the issue to arbitration. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (internal quotation marks and alterations omitted); see also *BG Grp.*, 572 U.S. at 34 ("[C]ourts presume that the parties intend courts, not arbitrators, to decide . . . disputes about 'arbitrability.'").

Unlike several of our prior cases, as the district court recognized, the arbitral agreement at issue in this case—a bilateral investment treaty—does not itself contain a clear statement empowering arbitrators to decide issues of arbitrability. We have previously concluded that where "parties explicitly incorporate rules that empower an arbitrator to decide issues of arbitrability, th[at] incorporation serves as clear and unmistakable evidence of the parties' intent to delegate such issues to an arbitrator." *Contec Corp. v. Remote Sol. Co., Ltd.*, 398 F.3d 205, 208 (2d Cir. 2005). For example, in *Republic of Ecuador* we held that a bilateral investment treaty's incorporation of the UNCITRAL Rules supplied "clear and unmistakable evidence" that the parties intended questions of

arbitrability to be decided by the arbitral panel. 638 F.3d at 394 (relying on UNCITRAL Article 21, which states that the arbitrator "shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the . . . arbitration agreement" (quoting UNCITRAL Arbitration Rules art. 21, ¶ 1, G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976)); *see also Schneider*, 688 F.3d at 72–73 (same). In this case, however, the Treaty did not adopt such arbitral rules (as it instead called for "*ad hoc*" arbitration), and no other clause appears to commit the issue of arbitrability to the arbitrators. Consequently, because the question of arbitrability is not subject to our presumption in favor of arbitration, we cannot assume that the Parties intended to leave the issue to arbitration.

Nonetheless, we find "clear and unmistakable" evidence of intent to submit issues of arbitrability to arbitration in another location: an agreement reached by the Parties at the outset of the arbitration. As recounted above, at the start of the arbitral process, the Parties met and conferred on several procedural aspects of the arbitration. In doing so, as reported in Procedural Order No. 1, the Parties agreed that the first phase of the arbitration would cover jurisdictional and liability disputes. We now hold that this agreement was sufficient in the context of the present arbitration to evidence the Parties' intent to submit arbitrability issues to arbitration.

In explaining our decision, we first emphasize the fact that the Parties made this agreement with respect to jurisdictional arguments *after* it had already become

clear that the key jurisdictional issue in dispute was the proper interpretation of Article 8(3) of the Treaty, an arbitrability issue. *Cf. First Options*, 514 U.S. at 945 (explaining that a concern animating the presumption in favor of judicial review is the fact that "[a] party often might *not* focus upon [the "who should decide arbitrability"] question or upon the significance of having arbitrators decide the scope of their own powers" (emphasis added)). For example, in Petitioners-Appellants' Request for Arbitration served on Mongolia nearly nine months prior to the first procedural meeting, Petitioners-Appellants argued that the "true interpretation" of Article 8 provides that jurisdiction of the arbitral tribunal is not "limited to an assessment of the compensation due for an expropriation," and that "[a]ny other interpretation would render the standard of protection under the Treaty purely formal and would thus defeat the purpose of the Treaty." Request for Arbitration ¶¶ 68–69. Considered in this context, we have little doubt then that in agreeing that the tribunal would hear jurisdictional issues , Petitioners-Appellants knew that they were submitting the key issue of arbitrability to resolution by the tribunal. Moreover, as we have previously explained, the fact that the Parties to the arbitration are not the same "parties" as those who signed the bilateral investment treaty is immaterial, given that bilateral investment treaties "merely create[] a framework through which foreign investors . . . can initiate arbitration against parties to the Treaty." *Republic of Ecuador*, 638 F.3d at 392 (explaining that a bilateral investment agreement is an agreement between two sovereign states that in effect constitutes a unilateral standing offer to submit to

arbitration with investors of the other sovereign when certain conditions are met); *see also BG Grp.*, 572 U.S. at 53 (Roberts, *C.J.*, dissenting). Mongolia, "'by signing the [1991 Treaty], and [Petitioners-Appellants], by consenting to arbitration, have created a separate binding agreement to arbitrate.'" *Schneider*, 688 F.3d at 71 (quoting *Republic of Ecuador*, 638 F.3d at 392).

Second, we discern no reason to conclude that evidence of intent to submit arbitrability issues to arbitration may be found only in arbitral agreements, and not in subsequent agreements reached by parties during an arbitration. While we have previously stated that "the issue of arbitrability may only be referred to the arbitrator if 'there is clear and unmistakable evidence from the *arbitration agreement*, as construed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator,'" *Shaw Grp. Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 121 (2d Cir. 2003) (quoting *Bell v. Cendant Corp.*, 293 F.3d 563, 566 (2d Cir. 2002) (internal quotation marks and emphasis omitted) (emphasis added)), we have previously relied, at least in part, on an agreement reached during an arbitration as evidence of intent to submit arbitrability issues to arbitration. In *Schneider*, we found that an investor and sovereign state had clearly and unmistakably agreed to arbitrate questions of arbitrability where the parties signed, after the tribunal was constituted, "Terms of Reference" empowering the tribunal to "consider . . . objections to jurisdiction." 688 F.3d at 70. While in that case we had the benefit of relying on both those Terms of Reference and the bilateral investment treaty's adoption of the UNCITRAL arbitral rules, we

"consider[ed] both . . . the agreed Terms of Reference and the incorporation of Article 21 of the UNCITRAL rules," in arriving at our conclusion as to arbitrability. *Id.* at 73.

We have also previously accepted adoptions of procedures by one party during the course of arbitration as evidence of intent with respect to arbitrability, particularly where the relevant treaty explicitly delegated the decision as to the applicable arbitral rules to that party. *See Republic of Ecuador*, 638 F.3d at 395 (finding that Chevron "consented to sending . . . threshold issues to the arbitrator" where the U.S.-Ecuador bilateral investment treaty provided that an investor initiating arbitration could choose, as one option, to submit the dispute for settlement by binding arbitration under the UNCITRAL rules, and Chevron invoked those rules in its notice of arbitration); *cf. Howsam*, 537 U.S. at 82 (relying on the fact that the party initiating arbitration was entitled under the arbitral agreement to select the arbitration forum, and the relevant party chose National Association of Securities Dealers ("NASD") arbitration by signing an agreement with the NASD that submitted the matter to arbitration in accordance with NASD rules). In this case, the Treaty in effect delegated certain questions about arbitrability to both Parties when it called for "*ad hoc*" arbitration,[10]

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[10] In this case, while the Treaty does not expressly adopt rules dealing with arbitrability, Article 8(5) of the Treaty indicates that "[t]he tribunal shall determine its own procedure," and that "the tribunal may, in the course of determination of procedure, take as guidance the [ICSID] Arbitration Rules . . . ." Treaty art. 8(5). The

the terms of which would need to be worked out by them.

Petitioners-Appellants nonetheless object that even if they argued arbitrability issues to the arbitrators, *de novo* review is still required because they did not give the tribunal "primary power" over arbitrability issues. In making this argument, Petitioners-Appellants attempt to draw a distinction between intending to submit arbitrability issues to arbitration and intending to submit arbitrability issues to arbitration *without the possibility of independent judicial review*. We have, however, previously rejected this argument. In *Republic of Ecuador*, we found "clear and unmistakable" evidence of intent to arbitrate arbitrability issues where the relevant treaty adopted UNCITRAL Article 21, which provides that the arbitrator "shall have the power to rule on objections that it has no jurisdiction." 638 F.3d at 394. As we explained, these rules clearly indicate that arbitrability issues are to be "decided by the arbitral panel in the first instance." *Id.* Then in *Schneider*, we rejected

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1984 version of those rules, which were operative at the time the Treaty was concluded, provide that an arbitral tribunal is to decide objections to whether a dispute is within its jurisdiction raised by the parties, and that, further, a tribunal "may on its own initiative consider . . . whether the dispute or any ancillary claims before it is within the jurisdiction of the Centre and within its own competence." International Centre for Settlement of Investment Disputes, Rules of Procedure for Arbitration Proceedings, Rule 41 (1984). Accordingly, the Treaty in no way forecloses the possibility of the Parties sending arbitrability issues to the arbitrators, and references as a possible source of guidance rules that expressly provide for such an approach.

Thailand's suggestion that our language "in the first instance" somehow suggested that the "arbitrators [had the] power to decide their jurisdiction at the outset of the arbitration without delay," but that adoption of such rules did not "preclude [] independent judicial review at the later confirmation stage." 688 F.3d at 73. We concluded that "[o]nce the parties have agreed that an arbitrator may decide questions regarding the scope of arbitrable issues in the first instance," federal courts are indeed required to afford deference to the arbitral tribunal's decision as to that scope. *Id.*; *see also id.* at 74 (explaining that adoption of the UNCITRAL Rules "necessarily means that a district court considering whether to confirm the award must review the arbitrators' resolution of such questions with deference").

Along similar lines, the fact that the Parties in this case agreed that the arbitrators would hear "jurisdictional" arguments, but did not expressly state that the arbitrators "have the power to" rule on jurisdictional issues, does not change our analysis. While we have often relied on arbitral rules with language of the latter sort, *see, e.g.*, *Contec Corp.*, 398 F.3d at 208 (relying on Rule 7 of the American Arbitration Association ("AAA") Rules, stating that with respect to jurisdiction "[t]he arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement"); *Schneider*, 688 F.3d at 72-73 (relying on similar language in UNCITRAL Article 21); *All. Bernstein Inv. Rsch. & Mgmt.*, 445 F.3d 121, 127 (2d Cir. 2006) (relying on NASD Code Rule 10324, which provides

that "[t]he arbitrators shall be empowered to interpret and determine the applicability of all provisions under this Code . . . . Such interpretations . . . shall be final and binding upon the parties"), this phrasing is hardly mandatory. For example, we have previously cited language in the International Chamber of Commerce Rules as evidence of the parties' clear and unmistakable intent to submit the issue of arbitrability to the arbitrators, where the relevant language in those rules suggests that an arbitral tribunal "may decide" issues of jurisdiction raised by the parties.[11] *Shaw Grp.*, 322 F.3d at 122. Similarly, in *Schneider*, we explained that language in the parties' Terms of Reference indicating that "'[t]he Tribunal may consider . . . objections to jurisdiction' . . . [wa]s entirely consistent with and parallel to the language in Article 21" of the UNCITRAL Arbitration Rules, 688 F.3d at 73, even though the language of those rules provided that "[t]he arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement," UNCITRAL Arbitration Rules art. 21, ¶ 1, G.A. Res. 31/98, U.N. Doc. A/RES/31/98 (Dec. 15, 1976); *see also Schneider*, 688 F.3d at 73–74 (relying on the parties' adoption of both the UNCITRAL Rules and the Terms of Reference as evidence of intent and referring to the language in the Terms of Reference as "substantially similar" to the language of the UNCITRAL Rules, *id.* at 74).

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[11] *See* International Chamber of Commerce, Arbitration Rules, Rule 6.2 (1998) (since revised on 1 Jan. 2021).

Accordingly, we conclude that the Parties "clearly and unmistakably" evidenced their intent to submit arbitrability issues to arbitration where they agreed to submit jurisdictional issues to the arbitrator during the first phase of the arbitration.

B.

Our conclusion that Petitioners-Appellants "clearly and unmistakably" intended to submit issues of arbitrability to the arbitrators is only reinforced by consideration of their conduct during the arbitration. *See Republic of Ecuador*, 638 F.3d at 395 (noting that in addition to invoking the UNCITRAL Rules, Chevron "argued that questions of arbitrability are for the arbitral panel"). In this case, after agreeing that the arbitrators would hear jurisdictional arguments, Petitioners-Appellants proceeded to affirmatively argue their case for the tribunal's jurisdiction over their claims both in their written memorial and at the hearing. *See* Claimants' Memorial (Mar. 1, 2011) at 16–25 (analyzing competing interpretations of the scope of Article 8(3) and arguing that the tribunal should adopt their reading and "assume jurisdiction over the[ir] claim for expropriation", *id.* at 25).[12] Petitioners-Appellants also submitted a letter to the tribunal on August 31, 2012, towards the close of briefing, requesting that the tribunal issue an order specifically for the purpose of "remind[ing] the parties

[12] Moreover, contrary to Petitioners-Appellants' claim, considerably before the Parties submitted these jurisdictional arguments, New York was selected as the seat of the arbitration, putting the Parties on notice as to New York and federal arbitration law.

that any award rendered by the Tribunal is *final* and binding and that the parties should not, directly or indirectly, take any steps that may undermine or affect the enforceability of the award," which strongly belies their argument on appeal that they did not believe that the tribunal had authority to conclusively determine jurisdictional issues. Mem. of Law in Opp'n to (1) Pet'rs' Pet. to Vacate Arbitral Award & (2) In Supp. of Resp'ts' Cross-Pet. to Confirm Arbitration Award, Attach. 8 at 2 ("Procedural Order No. 5") (emphasis added). Moreover, at no point in the arbitration did Petitioners-Appellants object to the arbitrators resolving arbitrability issues.

As such , we find nothing in Petitioners-Appellants' conduct during the arbitration that runs counter to our conclusion that Petitioners-Appellants intended to submit arbitrability issues to arbitration , as evidenced by their agreement with respect to jurisdictional issues. Instead, such conduct reinforces our conclusion. We therefore affirm the district court's decision declining *de novo* review of the Award.

II.

Having determined that independent review of the Award is not warranted, we review the Award only with deference. *See BG Grp.*, 572 U.S. at 33, 41; *E. Associated Coal Corp. v. United Mine Workers of Am., Dist. 17* , 531 U.S. 57, 62 (2000) (explaining that where parties send a matter to arbitration, "courts will set aside the arbitrator's interpretation of what [an] agreement means only in rare instances"); *Schneider*, 688 F.3d at 73–74 (explaining that where there is clear and unmistakable evidence of intent to arbitrate

arbitrability issues, "[t]his necessarily means that a district court considering whether to confirm the award must review the arbitrators' resolution of such questions with deference"). We hold that the district court did not abuse its discretion in concluding that Petitioners-Appellants failed to meet their burden with respect to vacatur under the FAA or the New York Convention. We further reject Petitioners-Appellants' challenge that the district court was required to compel arbitration on the merits.

A.

On appeal from an order by the district court confirming an arbitral award, we review legal conclusions and interpretations *de novo*, and findings of fact for clear error. *See VRG Linhas Aereas S.A. v. MatlinPatterson Glob. Opportunities Partners II L.P.*, 717 F.3d 322, 325 (2d Cir. 2013). As the law applicable to review of arbitral awards with foreign connections has proven prone to confusion,[13] we begin with a short explanation of the law relevant to the district court's review.

1.

Our starting point with respect to the confirmation of investor-state arbitral awards is the New York Convention, which applies to "the recognition and

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[13] *See CBF Indústria de Gusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58, 75 (2d Cir. 2017) (encouraging courts to "take care to specify explicitly the type of arbitral award the district court is evaluating," namely whether an award is "foreign," "nondomestic," or "domestic," and their jurisdictional posture in reviewing the award); *see infra* note 15.

enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought," as well as to "arbitral awards *not considered as domestic* awards in the State where their recognition and enforcement are sought." New York Convention art. 1(1) (emphasis added). While the Convention does not define awards "not considered as domestic," *see Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983) (explaining that "[t]he definition appears to have been left out deliberately in order to cover as wide a variety of eligible awards as possible, while permitting the enforcing authority to supply its own definition of 'nondomestic' in conformity with its own national law"), this Circuit has adopted a "broad[] construction" of that language, *id.* As we explained in *Bergesen*, for purposes of the reach of the Convention in our courts, awards "not considered as domestic" denotes awards that are subject to the Convention not because they were "made abroad," but because they are "made within the legal framework of another country." *Id.*; *see CBF Indústria de Gusa S/A v. AMCI Holdings, Inc.*, 850 F.3d 58, 70 (2d Cir. 2017) (explaining that for purposes of the New York Convention, an award is "'made' in the country of the 'arbitral seat,'" which is "'the jurisdiction designated by the parties or by an entity empowered to do so on their behalf to be the juridical home of the arbitration'" (quoting Restatement (Third) of the U.S. Law of International Commercial and Investor-State Arbitration § 1-1 (Am. L. Inst. 2012)). Such "nondomestic" awards include those that are "pronounced in accordance with foreign law or [which] involv[e] parties domiciled or having their principal place of business outside the enforcing jurisdiction."

Bergesen, 710 F.2d at 932.[14] Accordingly, as we have summarized, the New York Convention applies to three types of arbitral awards: (1) "arbitral awards 'made' in a foreign country that a party seeks to enforce in the United States (known as foreign arbitral awards)"; (2) "arbitral awards 'made' in the United States that a party seeks to enforce in a different country"; and (3) "nondomestic arbitral awards that a party seeks to enforce in the United States," where such awards are "nondomestic" on account of their connections with a foreign legal framework. *CBF*, 850 F.3d at 70; *see also id.* at 73.

The present case involves an arbitral award of the third type. Though the Parties agreed to seat the arbitration in New York, New York in the absence of a designated seat for the arbitration in the Treaty, the Award at issue qualifies as "nondomestic" as Petitioners-Appellants are all non-U.S. citizens disputing with a foreign sovereign over investments made in the territory of that foreign sovereign. *See Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 19 (2d Cir. 1997).

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[14] In light of Chapter 2 of the FAA, 9 U.S.C. § 201 *et seq.*, which implements the New York Convention, arbitral awards thus "fall[] under the [New York] Convention," 9 U.S.C. § 202, "*unless* both parties are citizens of the United States *and*" the legal relationship giving rise to the arbitration "'involves [neither] property located abroad, [nor] envisages performance or enforcement abroad, [n]or has some other reasonable relation with one or more foreign states,'" *CBF*, 850 F.3d at 71 (quoting 9 U.S.C. § 202) (emphases and alterations in original)); *see also Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 19 (2d Cir. 1997).

Application of the New York Convention does not, however, limit the application of the FAA in the present case. *Id.* at 20. To the contrary, while Article V of the New York Convention provides "the exclusive grounds for refusing confirmation under the Convention," we have previously explained that "one of those exclusive grounds is where '[t]he award . . . has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.'" *Id.* (quoting New York Convention art. V(1)(e)). The inclusion of this grounds means that "the state in which, or under the law of which, [an] award is made, [is] free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief." *Id.* at 23. Consequently, because the Parties elected to seat the arbitration in New York, the "available grounds for vacatur include all the express grounds for vacating an award under the FAA." *Zurich Am. Ins. Co. v. Team Tankers A.S.*, 811 F.3d 584, 588 (2d Cir. 2016).[15]

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[15] We have previously referred to federal courts sitting in this posture—reviewing a request under the New York Convention for confirmation or vacatur of a nondomestic award rendered in the United States—as exercising "primary jurisdiction," as compared to "secondary jurisdiction." *CBF*, 850 F.3d at 71. We have used the latter term to refer to the situation where courts are asked to enforce an award rendered abroad, meaning that, in accordance with the New York Convention, they may refuse enforcement only on the limited grounds specified in Article V. *Id.* To be certain, then, in this case the district court exercised "primary jurisdiction" over the Award on account of the Parties having elected to seat the arbitration in New York. *Id.* at 73.

2.

Having recounted the law applicable to petitions to confirm or set aside the Award in this case, we proceed to the merits of Petitioners-Appellants' claims for vacatur. We reach our conclusion in short order.

"The confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court." *Toys "R" Us*, 126 F.3d at 23 (quoting *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984) (alterations omitted)). "The review of arbitration awards is 'very limited . . . in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation.'" *Id.* (quoting *Folkways Music Publishers, Inc. v. Weiss*, 989 F.2d 108, 111 (2d Cir. 1993)). Moreover, petitioners "must clear a high hurdle" to successfully contend that the decision of an arbitral tribunal must be vacated. *Stolt-Nielsen S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662, 671 (2010).

In this case, as the district court recognized, Petitioners-Appellants did not clearly indicate in their filings below any provision of the FAA or the New York Convention providing grounds to grant vacatur of the Award. They also did not reply with any specificity to Mongolia's arguments against vacatur under the FAA**.** Accordingly, the district court would have been on firm ground had it rejected Petitioners-Appellants' arguments on this basis. *See Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9, 12 (2d Cir. 1997) (explaining that a party seeking to avoid summary confirmation of an

arbitral award and seeking vacatur has the burden of proof). Nonetheless, because the district court construed Petitioners-Appellants' arguments as a petition to vacate the Award on the ground that the Award resulted from an excess of arbitral power, *see* 9 U.S.C. § 10(a)(4), we review its analysis of that issue. We agree that Petitioners-Appellants have not met their burden of showing that vacatur is warranted on this ground.

Under Section 10(a)(4) of the FAA, an arbitral decision may be vacated where the "arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4). In our case law, "[w]e have consistently accorded the narrowest of readings to the [FAA's] authorization to vacate awards pursuant to § 10(a)(4)." *Westerbeke Corp. v. Daihatsu Motor Co., Ltd.*, 304 F.3d 200, 220 (2d Cir. 2002) (quoting *In re Andros Campania Maritima, S.A.*, 579 F.2d 691, 703 (2d Cir. 1978) (alterations omitted)). Our analysis under Section 10(a)(4) therefore "focuses on whether the arbitrators had the power, based on the parties' submissions or the arbitration agreement, to reach a certain issue, not whether the arbitrators correctly decided that issue." *Id.* (quoting *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 824 (2d Cir. 1997)); *see also In re Fahnestock & Co., Inc.*, 935 F.2d 512, 515 (2d Cir. 1991). Indeed, only where an arbitrator "'act[s] outside the scope of his contractually delegated authority'—issuing an award that 'simply reflect[s] [his] own notions of [economic] justice' rather than 'draw[ing] its essence from the contract'—may a court

overturn his determination." *Oxford Health Plans LLC v. Sutter*, 569 U.S. 564, 569 (2013) (quoting *E. Associated Coal Corp.*, 531 U.S. at 62).

As established in Part I of this opinion, the Parties "clearly and unmistakably" submitted the issue of the scope of the arbitrators' jurisdiction under Article 8(3) of the Treaty to the tribunal. Therefore, "the sole question for us is whether the arbitrator[s] (even arguably) interpreted the parties' contract, not whether [they] got its meaning right or wrong." *Id*. Here, the tribunal's determination that it lacked jurisdiction under a reasonable reading of Article 8(3) fell well within its interpretative authority. *Cf. BG Grp.*, 572 U.S. at 44 (finding that the arbitration panel's determination that a local litigation requirement did not impede arbitration fell "well within the arbitrators' interpretive authority"). The tribunal's reasoning also drew "its essence from the agreement to arbitrate," *see ReliaStar Life Ins. Co. of N.Y. v. EMC Nat'l Life Co.*, 564 F.3d 81, 85 (2d Cir. 2009), as indeed the arbitrators looked closely at the text of the Treaty in arriving at their decision, in line with customary approaches to treaty interpretation, while distinguishing competing interpretations in their analysis. As such, even if we would not necessarily reach the same interpretation,[16] any difference in opinion is not enough to conclude that

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[16] In reaching our decision, we do not express an opinion on the correctness of the arbitral tribunal's decision on jurisdiction. *See Banco de Seguros del Estado v. Mut. Marine Off., Inc.*, 344 F.3d 255, 262 (2d Cir. 2003) (cautioning that when reviewing arbitral awards under the FAA, courts are not to determine whether the arbitrators "correctly" decided issues put to them (quoting *DiRussa*, 121 F.3d at 824)).

the arbitrators "stray[ed] from interpretation and application of the agreement and effectively dispense[d] [their] own brand of . . . justice." *Stolt-Nielsen, S.A.* , 559 U.S. at 671 (internal quotation marks and alterations omitted); *BG Grp.*, 572 U.S. at 45.

We are also not persuaded that the tribunal's decision not to exercise jurisdiction somehow merits a different analysis. As we have previously recognized, the fact that there is a "sufficient relationship" between the parties and "the rights created under [an] agreement" to justify the initiation of arbitration by no means precludes an arbitrator from later deciding, in the course of that arbitration, "that the dispute itself [is] not arbitrable." *Republic of Ecuador*, 638 F.3d at 395 (internal quotation marks and alterations omitted).

We therefore find no evidence that the arbitrators "exceeded their powers" and affirm the district court's confirmation of the Award. 9 U.S.C. § 10(a)(4).

B.

Finally, we reject Petitioners -Appellants' challenge to the district court's denial of their motion to compel arbitration under Section 4 of the FAA. 9 U.S.C. § 4. We review the district court's decision on this issue *de novo*. *See LAIF X SPRL v. Axtel, S.A. de C.V.*, 390 F.3d 194, 198 (2d Cir. 2004).

In deciding a motion to compel arbitration,[17] "the role of courts is limited to determining two issues: i) whether a valid agreement or obligation to arbitrate exists, and ii) whether one party to the agreement has failed, neglected or refused to arbitrate." *Id.* (quoting *Jacobs v. U.S.A. Track & Field*, 374 F.3d 85, 88 (2d Cir. 2004)). "A party has refused to arbitrate if it 'commences litigation or is ordered to arbitrate th[e] dispute [by the relevant arbitral authority] and fails to do so.'" *Id.* (quoting *Jacobs*, 374 F.3d at 89 (alteration in original)). Once a party petitions to compel arbitration, "[t]he court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4.

Applying these principles, Petitioners-Appellants have no claim under Section 4 of the FAA to compel arbitration. Mongolia neither commenced litigation in lieu of arbitration, nor refused to comply with an order to arbitrate the dispute issued by the arbitrators. *See Jacobs*, 374 F.3d at 89. Mongolia instead answered the

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[17] Section 4 of the FAA provides in relevant part:

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. 9 U.S.C. § 4.

arbitral demand, here styled as a "request for arbitration," duly appointed its arbitrator, participated in the selection of the president of the arbitral tribunal, was present at meetings to decide the procedures and organization of the arbitration, fully pursued its defense, and complied with the demands of the tribunal. *See LAIF X*, 390 F.3d at 199. Moreover, Mongolia's challenge to the arbitrability of Petitioners-Appellants' claims before the tribunal, *i.e.*, its argument that the tribunal lacked jurisdiction under Article 8(3), in no way constituted a refusal to arbitrate such that Petitioners-Appellants accrued a claim under Section 4 of the FAA for the district court to compel arbitration. *See Jacobs*, 374 F.3d at 89 ("The fact that respondents raised before the AAA an objection to petitioner's Demand for Arbitration . . . does not constitute a 'refusal to arbitrate' on the part of respondents."). Accordingly, we find no basis on which to accept Petitioners-Appellants' contentions and we affirm the district court's denial of their petition to compel arbitration.

* * *

In the absence of "clear and unmistakable" evidence that the parties to an arbitration have agreed to allow arbitrators to decide arbitrability issues, district courts are required to independently review those issues. Owing to preferences for efficiency, or the specialized expertise of arbitrators, parties may nonetheless decide to reverse this presumption and submit arbitrability issues to the determination of arbitrators. We affirm today that in the context of bilateral investment treaty arbitration, courts may find evidence of parties' intent

to submit arbitrability issues to arbitration in subsequent agreements reached by parties during the course of an arbitration.

CONCLUSION

For the foregoing reasons, we AFFIRM the order of the district court.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

17 Civ. 7436 (ER)

[Filed: November 25, 2019]

BEIJING SHOUGANG MINING INVESTMENT COMPANY LTD.,CHINA HEILONGJIANG INTERNATIONAL ECONOMIC & TECHNICAL COOPERATIVE CORP., and QINHUANGDAOSHI QINLONG INTERNATIONAL INDUSTRIAL CO. LTD,	)
Petitioners,	)
– against –	)
MONGOLIA,	)
Respondent.	)

OPINION & ORDER

Ramos, D.J.:

For over a decade, the petitioners, a group of three Chinese companies, and respondent, the country of Mongolia, fought over the ownership of a valuable mining concession. Those proceedings started in the

Mongolian court system, rose to its Supreme Court, jumped to an arbitration tribunal in New York, and, pause for now here, in the Southern District of New York. The Chinese companies move this Court to perform a de novo review of the arbitral tribunal's decision that the dispute between the parties was not arbitrable, vacate that decision, and compel the parties to return to arbitration for a decision on the merits. Mongolia cross-moves the Court to defer to the arbitrators' reasoning and confirm their award.

The Chinese companies, by initiating this arbitration, affirmatively arguing for the tribunal's jurisdiction, and vigorously participating in the seven-year-long arbitration proceedings, have waived their opportunity to object now to the arbitrators' ability to decide arbitrability. The Court therefore finds that the parties clearly and unmistakably agreed to place the question of arbitrability before the tribunal, and the Court confirms the award after performing a deferential review. Mongolia's motion is GRANTED. The Chinese companies' motion is DENIED.

I. BACKGROUND

In 1991, the Chinese and Mongolian governments signed the Agreement Between the Government of the Mongolian People's Republic and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments.[1] This bilateral investment treaty ("BIT")

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[1] Available at http://tfs.mofcom.gov.cn/aarticle/h/at/201002/20100206778627.html (last visited Nov. 15, 2019). The Mongolian People's Republic was a predecessor Soviet satellite-state to the

provides for the equal treatment of investments by the states, banned state expropriation of the investments of the other state's companies, and detailed the terms and procedures of arbitration should any disputes under the treaty arise. The treaty came into force in 1993.

One of the Chinese companies, Qinhuangdoaoshi Qinlong International Industrial Company Ltd. ("Qinlong"), formed a joint venture with a Mongolian partner in 2002 to develop an iron ore deposit in the Tumurtei region of northern Mongolia. Decl. of Michael A. Granne Ex. A ("Award") ¶ 91, Doc. 1. The other two companies — Beijing Shougang Mining Investment Company Ltd. and China Heilongjiang International Economic & Technical Cooperative Corp. — purchased equity in the joint venture from Qinlong in 2004. *Id.* ¶ 92. In 2005, the Mongolian partner transferred a license allowing the export of iron ore to the joint venture in 2005. *Id.* ¶ 90.

Over the course of 2006, Mongolian authorities scrutinized the operations of the joint venture, eventually revoking the license in September. *See generally* Award ¶¶ 150–76. The joint venture sued in a Mongolian court in November 2006, taking its case as high as the Supreme Court of Mongolia. *Id.* ¶ 179. Ultimately it was unsuccessful in regaining the mining license. *Id.* By 2009 — after a complex series of lawsuits involving several other companies and the Mongolian government — the license and land-use rights to the iron ore deposit came to rest with a

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now-democratic state of Mongolia. Award ¶¶ 103, 106.

Mongolian state-owned metallurgy company. *Id.* ¶¶ 184, 189. The Chinese companies initiated arbitration under article 8 of the BIT in February 2010 alleging that Mongolia had expropriated their investment in breach of article 4. *Id.* ¶¶ 6, 190.

The New York arbitration, featuring an ad-hoc panel of three arbitrators and hosted by the Permanent Court of Arbitration, continued for seven years. The Chinese companies submitted their memorial in March 2011. *Id.* ¶ 19. Mongolia responded with a counter-memorial in September, alleging counterclaims and objecting to the tribunal's jurisdiction over the companies' initial claims. *Id.* ¶ 21. In June 2012, the Chinese companies filed a reply to Mongolia's counter-memorial, raising their own objections to the tribunal's jurisdiction over the counterclaims. *Id.* ¶ 28. Mongolia responded with a rejoinder in December 2012. *Id.* ¶ 34. After a three-year pause due to discovery and a need to replace one arbitrator, the tribunal held a September 2015 hearing in the Netherlands. *Id.* ¶ 77.

The Chinese companies frequently and affirmatively argued for the ability of the arbitrators to hear this dispute. They never raised any objection to the arbitrators themselves deciding this question. They first raised the question of arbitrability before the tribunal in their petition to arbitrate. *See* Decl. of Michael A. Granne Ex. B, part V.3. In that petition, they argued for jurisdiction through the treaty's text and purpose. *See, e.g.*, *id.* ¶¶ 68, 69. They expanded upon those arguments in their memorial, adding citations to other international arbitrations. *See* Decl.

of Michael D. Nolan Ex. 1 ¶¶ 60–88. Throughout that memorial, the companies explicitly "submitted" their arguments to the arbitrators and did not object to their consideration of the question of arbitrability. *See, e.g.*, *id.* ¶ 61 ("The Claimants submit that the ordinary meaning of Article 8(3) in the context of the Treaty and in the light of its object and purpose can only be construed to the effect that the Arbitral Tribunal has jurisdiction . . . ."). Next, at a procedural conference a few months after the submission of the companies' memorial, the parties agreed to decide jurisdiction and merits at the same time, rather than bifurcating the issues. *Id.* ¶ 16. Then, after Mongolia responded to the jurisdictional arguments in its counter-memorial, the companies replied without raising objection to the arbitrators' ability to hear a dispute over jurisdiction. *See* Decl. of Michael D. Nolan Ex. 3 at 43–48.

The tribunal issued its award in June 2017. After determining that the Chinese companies had standing to bring an arbitral claim under the BIT, Award ¶¶ 442, the tribunal centered its analysis on whether the BIT allows an arbitral panel to determine a state's liability for expropriation, as opposed to the amount of compensation owed. *Id.* ¶ 423 (citing Mongolia's arguments at *id.* ¶¶ 252–68.). The tribunal began by interpreting the ordinary meaning of the relevant BIT provision in context and in light of its object and purpose. *Id.* ¶ 424 (citing the Vienna Convention on the Law of Treaties of 1969, art. 31(1)[2]). Based on the

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[2] Available at https://treaties.un.org/doc/Treaties/1980/01/19800127%2000-52%20AM/Ch_XXIII_01.pdf (last visited Nov. 18, 2019).

structure of the treaty, it found that the entirety of its jurisdiction was described by article 8(3) of the BIT, specifically, "dispute[s] involving the amount of compensation for expropriation." *Id.* ¶ 436.

The tribunal then focused on the meaning of this phrase, looking at the ordinary meaning of the words within it and its place within the structure of the treaty. Award ¶¶ 438–45. It determined that the phrase limits the jurisdiction of the tribunal to disputes over whether compensation already paid was adequate, not whether compensation was due in the first instance. *See id.* ¶ 445. It supported its decision by distinguishing competing decisions from other arbitral tribunals and the Singapore Court of Appeal that found such an interpretation to render the provision without any legal effect. *Id.* ¶¶ 447–48. In doing so, it pointed out that arbitration can be commenced after the direct declaration of an expropriation by a government or indirect declaration through the Mongolian courts. *Id.* ¶¶ 448–49. Such a procedure, it held, was the choice of China and Mongolia when they negotiated the BIT and consistent with the object and purpose of the BIT. *Id.* ¶¶ 450–51. Based on this analysis, it rejected jurisdiction over both the Chinese companies' claims and the Mongolian counterclaims, closing the arbitration. *Id.* ¶ 477.

II. RELEVANT LAW

A party seeking vacatur of an arbitral award may normally seek a de novo court review of questions of arbitrability, including questions of whether a given dispute falls within the ambit of an arbitration clause. *See Schneider v. Kingdom of Thailand*, 688 F.3d 68, 71

(2d Cir. 2012) (citing *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002)). If, however, there is "clear and unmistakable evidence" that the parties agreed to arbitrate arbitrability, then courts are to review the tribunal's decision like any other arbitral decisions — with deference. *See First Options*, 514 U.S. 938, 943–44 (1995).

The limited grounds allowed for vacatur when an award is granted deference are outlined in the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10, and — for awards involving foreign entities — in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (the "New York Convention"), art. V.[3] For an award made in the United States involving foreign entities, a court may vacate it under a ground articulated in either the FAA or the New York Convention. *See Zurich Am. Ins. Co. v. Team Tankers A.S.*, 811 F.3d 584, 588 (2d Cir. 2016); *see also Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997) ("The [New York] Convention specifically contemplates that the state in which . . . the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief.").

Confirmation of an arbitral award normally takes the form of a summary proceeding that converts a final arbitration award into a judgment of the court. *D.H. Blair & Co., Inc. v. Gottdiener,* 462 F.3d 95, 110 (2d

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[3] Available at http://www.newyorkconvention.org/english (last visited Nov. 18, 2019).

Cir. 2006). The court is required to grant the award unless it is vacated, modified, or corrected. *Id.* (quoting 9 U.S.C. § 9). An application for a judicial decree confirming an award receives "streamlined treatment as a motion, obviating the separate contract action that would usually be necessary to enforce or tinker with an arbitral award in court." *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 582 (2008).

III. THE COURT'S STANDARD FOR REVIEWING THE AWARD

The Court has conducted a review of the bilateral investment treaty forming the basis for the arbitration, and it has reviewed the conduct of the parties before the tribunal. It finds that, although the treaty itself does not contain clear and unmistakable evidence that the parties intended to place the question of arbitrability before the arbitrators, the Chinese companies' behavior during the arbitration does.

The treaty does not contain any explicit agreement regarding what body may decide the arbitrability of an issue. As proof of explicit agreement, Mongolia points to the first sentence of article 8(5): "The tribunal shall determine its own procedure." The country urges the Court to read it as a broad grant of power to the tribunal. The Court declines this invitation.

The word "procedure," by its plain meaning, does not encompass rules detailing jurisdiction. Black's Law Dictionary defines the term as, "A specific method or course of action," and, "The judicial rule or manner for carrying on a civil lawsuit or criminal prosecution." *Procedure*, Black's Law Dictionary (11th ed. 2019).

Similarly, although the Rules Enabling Act, 28 U.S.C. § 2072, authorizes the Supreme Court to "prescribe general rules of practice and procedure," the Act does not allow the Supreme Court to set the courts' jurisdiction; that task is handled separately by the U.S. Constitution and 28 U.S.C. §§ 1330, *et seq*.

In addition, other arbitration agreements construed by U.S. courts to commit the question of arbitrability to arbitrators do so differently. For example, the Second Circuit considered whether a BIT between the United States and Ecuador committed the question of arbitrability to an arbitral tribunal. *See Republic of Ecuador v. Chevron Corp.*, 638 F.3d 384, 394 (2d Cir. 2012). It found the states had agreed to give the tribunal such power by agreeing to the use of the UN Commission on International Trade Law ("UNCITRAL") Arbitration Rules, which state that an arbitrator "shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the . . . arbitration agreement." *Id.* There is no similar language in the Mongolia–China BIT that makes the committal of arbitrability determinations to the arbitrators clear. *See also* S*chneider v. Kingdom of Thailand*, 688 F.3d 68, 73 (2d Cir. 2012) (applying reference to UNCITRAL rules in arbitration terms between company and Thailand); *Contec Corp. v. Remote Solution Co.*, 398 F.3d 205, 208 (2d Cir. 2005) (applying reference to rules of the American Arbitration Association in a domestic arbitration agreement).

Instead, Mongolia primarily argues that the Chinese companies have acquiesced to the arbitrators' consideration of arbitrability through their conduct during the arbitration. Specifically, Mongolia argues that the Chinese companies brought the arbitration, that they made arguments in favor of arbitrability in their very first submission and that — while discussing arbitrability — they never so much as objected to the arbitrators' consideration. The companies argue their behavior here does not rise to the level of "clear and unmistakable evidence" described in *First Options*, 514 U.S. 938, 944 (1995).

In *First Options*, the Supreme Court faced a motion to vacate an arbitration award brought by the respondents in the underlying arbitration. *Id.* at 940–41. During the arbitration itself, the respondents only participated by sending a single memo disputing the jurisdiction of the arbitrators because the respondents had never signed the arbitration agreement. *Id.* at 941. After the arbitration was complete, the respondents sought relief in the federal courts and asked that the courts conduct a de novo review of the arbitrators' decision that this dispute was arbitrable. *Id.* The Court ruled that, given their limited appearance, the respondents had not acquiesced to the arbitrator's ability to decide arbitrability and affirmed the lower court's de novo review. *Id.* at 946.

The facts of *First Options* are very different from the instant case. The *First Options* Court had in front of it respondents who opposed the formation of any arbitration agreement at all. There is no dispute that the BIT exists here. The *First Options* arbitration

respondents participated only through a single memo objecting to arbitrability. The Chinese companies vigorously participated for seven years in the underlying arbitration.

The factor that most distinguishes this case, however, is the fact that the companies initiated the arbitration and argued for the arbitrators' jurisdiction from their very first submission. Unlike the *First Options* arbitration respondents, the Chinese companies had a choice about where, how, and under what bases to initiate this arbitration. Rather than go to a court and compel arbitration, they handed the questions to the arbitrator from the very beginning. This behavior constitutes waiver. See *Opals on Ice Lingerie v. Bodylines Inc.*, 320 F.3d 362, 368 (2d Cir. 2003) ("[I]f a party participates in arbitration proceedings without making a timely objection to the submission of the dispute to arbitration, that party may be found to have waived its right to object to the arbitration.").

The Court's reasoning is buttressed by the result of a case facing Judge Marrero of this District in 2007, *In re Arbitration between Halcot Navigation Ltd. Partnership and Stolt-Nielsen Transp. Group*, 491 F. Supp. 2d 413 (S.D.N.Y. 2007). There, an arbitration respondent made a submission to the panel, asking that the parties submit briefing so that the arbitrability dispute could be heard by that panel. *Id.* at 417. Judge Marrero ruled that the respondent's attempt to have the district court review the tribunal's jurisdictional decision after the respondent had declined to object below, "create[d] a win-win outcome

for itself, as a means of having it both ways, allowing the arbitrability issue to proceed to adjudication by the arbitrators and accepting the result if favorable to [the respondent], or rejecting it if unfavorable and litigating the matter in court." *Id.* at 419; *see also Cleveland Elec. Illuminating Co. v. Utility Workers Union of America*, 440 F.3d 809, 813 (6th Cir. 2006) (holding that a failure to object to tribunal's ability to arbitrate arbitrability was waiver of that argument in federal court review).

The reasoning of *Halcot* holds even stronger here. The Chinese companies affirmatively presented their desire for the arbitrators to decide arbitrability in its initial petition and developed those arguments over at least three formal submissions. And it agreed at the very first procedural meeting to decide jurisdiction simultaneously with the dispute. It cannot be said that, after starting the whole proceeding, framing the jurisdictional issue, participating for seven years, and never objecting, the companies can *now* come to a U.S. court and claim that this question was not one for the arbitrators to decide.

Accordingly, the Court finds that the question of arbitrability was clearly and unmistakably put before the arbitrable tribunal. It proceeds to a deferential review of the award.

IV. REVIEW OF THE AWARD

The Chinese companies do not point in their moving papers to any provision of the FAA or the New York Convention as independent grounds to grant vacatur if the Court declined to conduct a de novo review. Nor did the companies specifically reply to Mongolia's

arguments arguing against vacatur under any of the New York Convention bases or under section 10(a)(4) of the FAA. The Court could consider such arguments thus waived. *See Brown v. City of New York*, 862 F.3d 182, 187 (2d Cir. 2017) ("The discretion trial courts may exercise on matters of procedure extends to a decision on whether an argument has been waived.")

Instead, it will construe the companies' arguments concerning the accuracy of the arbitrators' decision as a petition to vacate the award under section 10(a)(4) of the FAA. The section provides for vacatur if the arbitrators "exceeded their powers or, so exceeded their authority that the award is meaningless." The Chinese companies' burden to convince the Court that the arbitration should be vacated on this ground is high, and it must be shown that the tribunal's award did not "draw its essence" from the agreement to arbitrate. *See ReliaStar Life Ins. Co. of N.Y. v. EMC Nat. Life Co.*, 564 F.3d 81, 85 (2d Cir. 2009). Otherwise, the Court will uphold the award so long as it offers a "barely colorable justification for the outcome reached." *Id.* at 86 (internal quotation omitted).

The tribunal's analysis, as detailed above, easily passes the deferential standard of review before this Court. The Court does not express an opinion on the accuracy of that analysis. *See id.* at 86 (cautioning courts to "not consider whether the arbitrators correctly decided the issue." (internal quotation and alteration omitted). But the Court finds that the multiple justifications the arbitrators provided for their jurisdiction to be well beyond colorable and, given that

the analysis was almost entirely based on the text of the treaty, surely drawn from its essence.

V. CONCLUSION

For the foregoing reasons, the Court DENIES the Chinese companies' petition to vacate the award and confirm arbitration. It GRANTS Mongolia's cross-petition to confirm the award. The Clerk of Court is respectfully directed to close the case.

It is SO ORDERED.

Dated: November 19, 2019
New York, New York

/s/Edgardo Ramos
Edgardo Ramos, U.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

Docket No: 19-4191

[Filed: October 14, 2021]

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of October, two thousand twenty-one.

Beijing Shougang Mining Investment Company, Ltd., China Heilongjiang International Economic and Technical Cooperative Corp, Qinhuangdaoshi Qinlong International Industrial Co. Ltd.,	)
Petitioners - Appellants,	)
v.	)
Mongolia,	)
Respondent-Appellee.	)

ORDER

Appellants filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel

that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

/s/Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk

APPENDIX D

CHINA HEILONGJIANG INTERNATIONAL ECONOMIC & TECHNICAL COOPERATIVE CORP., BEIJING SHOUGANG MINING INVESTMENT COMPANY LIMITED, AND QINHUANGDAOSHI QINLONG INTERNATIONAL INDUSTRIAL CO. LTD.

v.

MONGOLIA

PROCEDURAL ORDER NO. 1

2 November 2010

WHEREAS, by their Request for Arbitration dated 12 February 2010, Claimants China Heilong International Economic & Technical Cooperative Corp., Beijing Shougang Mining Investment Company Limited, and Qinhuangdaoshi Qinlong International Industrial Co. Ltd. initiated this proceeding against Respondent Mongolia, asserting jurisdiction on the basis of the Agreement between the Government of the Mongolian People's Republic and the Government of the People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments dated 26 August 1991 (the "Treaty"), with reference to the Foreign Investment Law of Mongolia and the Agreement between the Government of the

United Kingdom of Great Britain and Northern Ireland and the Government of the Mongolian People's Republic for the Promotion and Protection of Investments dated 4 October 1991;

WHEREAS, by that Request, Claimants appointed Dr. Yas Banifatemi as Arbitrator in this proceeding;

WHEREAS, by letter dated 19 May 2010, Respondent appointed Mark A. Clodfelter, Esq., as Arbitrator in this proceeding;

WHEREAS, by letter dated 19 July 2010, Claimants requested that Meg Kinnear, Secretary-General of the International Centre for the Settlement of Investment Disputes, acting pursuant to Article 8(4) of the Treaty, appoint the President of the Tribunal;

WHEREAS, by letter dated 10 August 2010, Ms. Kinnear appointed Donald Francis Donovan, Esq., as President of the Tribunal;

WHEREAS, on 22 September 2010, the Tribunal circulated an agenda for a procedural meeting to be held in New York on 1 October 2010, and on 28 September 2010, addressed certain points on that agenda, and on 30 September 2010, received a joint communication from the parties addressing additional points on that agenda;

WHEREAS, on 1 October 2010, as scheduled, the Tribunal conducted a procedural meeting with the

parties in the offices of Debevoise & Plimpton LLP in New York;

NOW, THEREFORE, the Tribunal issues this Procedural Order No. 1 reflecting the agreements reached during the procedural meeting and determining the issues left open as of the end of that meeting.

A. Constitution of the Tribunal

1. The parties confirmed that the Tribunal had been properly constituted under Article 8(4) of the Treaty.

B. Declarations by Tribunal Members

2. Each Member of the Tribunal stated that he or she was independent and impartial, and each advised that there were no circumstances of which he or she was aware that might raise justifiable doubts about his or her independence and impartiality.

3. Contact information for the Members of the Tribunal is attached to this Order as Appendix A.

C. Representatives of the Parties

4. Claimants are represented by Peter Turner, Marie Stoyanov, Francisco Abriani, and Ben Love of Freshfields Bruckhaus Deringer LLP, in Paris, and Peter Pokwong Yuen and John Choog

of Freshfields Bruckhaus Deringer LLP, in Hong Kong. Claimants are also represented by Professor James Crawford of The Lauterpacht Centre for International Law, Cambridge University.

5. Respondent is represented by Michael D. Nolan, Frédéric G. Sourgens, and Edward Baldwin, of Milbank, Tweed, Hadley & McCloy LLP, in Washington D.C.; T. Altangere, Ministry of Justice and Home Affairs, Mongolia; and Gankhuyag Sodnom, Deputy Permanent Representative of Mongolia to the United Nations.

6. Contact information for the representatives of the parties is attached to this Order as Appendix B.

D. Administrative assistance of the PCA

7. With the parties' consent, the Tribunal appoints the International Bureau of the PCA as administrator of the proceeding. The Tribunal expects that in light of the appointment of a Secretary, the PCA's administrative assistance will consist only of the handling of the financial aspects of the proceeding and, possibly, assistance with hearings.

8. The PCA shall be sent electronic copies of all filings and correspondence by the party making the filing or sending the correspondence, and it will handle deposits in respect of advances on

costs and disbursements. The Tribunal requests that, on behalf of both parties, Claimants file with the PCA their Request for Arbitration and the letters appointing Mr. Clodfelter and Mr. Donovan, respectively.

9. The PCA shall, if requested, make its hearing and meeting rooms in the Peace Palace in The Hague and elsewhere (Costa Rica, Singapore) available to the parties and the Tribunal at no charge. Costs of catering, court reporting, or other technical support associated with hearings or meetings at the Peace Palace or elsewhere shall be borne by the parties in equal shares.

10. Upon request, PCA staff shall carry out administrative tasks on behalf of the Tribunal, and shall bill their time in accordance with the PCA Schedule of Fees.

11. By Monday, 22 November 2010, the parties should advise whether they agree to (a) the listing of this case on the docket of the PCA and (b) the publication of decisions and awards in the case, either when rendered or upon conclusion.

12. The contact details of the PCA are set out on Appendix C to this Order.

E. Compensation of the Arbitrators

13. By its email dated 28 September 2010, the Tribunal proposed that its Members be

compensated at a rate of US $700/hour for services as arbitrator rendered during the proceeding. By their joint communication of 30 September 2010, the parties advised that they "consider[ed] that given the reference to the ICSID arbitration rules in the Treaty, the arbitrators should be remunerated on the ICSID scale."

14. At the 1 October 2010 procedural meeting, the Tribunal advised the parties that it had proposed the rate set forth in the 28 September communication on the basis of consultation with Brooks Daly, Deputy Secretary-General of the Permanent Court of Arbitration, and Meg Kinnear, Secretary-General of the International Centre for the Settlement of Investment Disputes. Specifically, the Tribunal noted that Mr. Daly had advised that standard rates in ad hoc investment treaty arbitrations administered by the PCA ranged between €500 to €600 (excluding higher rates in one or two other proceedings that he did not consider representative), and that Ms. Kinnear had advised that the range of compensation for arbitrators in non-Convention arbitrations administered by ICSID, including those under the Additional Facility, ranged from US$500 to US$900. Accordingly, the Tribunal advised, its Members believed it appropriate to set compensation at a point in the middle of those ranges.

15. By its Article 8(5), the Treaty provides that "[t]he tribunal shall determine its own procedure." "However," Article 8(5) continues, "the Tribunal may, in the course of determination of procedure, take as guidance the Arbitration Rules of the International Centre for Settlement of Investment Disputes."

16. The Tribunal notes that by the terms of Article 8(5), it "may" take those Rules as "guidance." Further, as it suggested at the hearing, the Tribunal notes that the standards for compensation of Tribunal members in proceedings governed by the ICSID Convention is found not in the Rules, but in the ICSID Administrative and Financial Regulations.

17. The Tribunal asked the parties to state their respective positions, in light of the language of Article 8(5), as to whether (a) the Tribunal had final authority to set its own compensation, or (b) the Tribunal would be bound by an agreement of the parties on that point. Claimants advised that, in their view, the Tribunal and the parties needed to come to an agreement as to compensation, failing which the Tribunal would have no obligation to serve. Respondent advised that, in its view, compensation was a component of procedure, and therefore the language of Article 8(5) conferred final authority on the Tribunal to set its own compensation. In turn, Claimants advised that in light of Respondent's position,

they would consent to any compensation the Tribunal determined.

18. The Tribunal also asked whether the parties would consent to a request by the Tribunal that the PCA, whose administrative services it has been determined the Tribunal would employ, set the Tribunal's compensation, if the Tribunal determined to proceed in that manner. The parties advised that they would consent to that course.

19. In sum, Respondent acknowledges the Tribunal's authority to set its compensation, and in light of Respondent's position, Claimants consent to such compensation as the Tribunal may set. At the same time, the parties have advised that they would consent to a request by the Tribunal that the PCA set its Members' compensation.

20. In these circumstances, by a letter sent to the PCA simultaneously with the issuance of this Order, the Tribunal requests that the PCA recommend a rate at which the Tribunal should be compensated, which rate the Tribunal will adopt in setting its Members' compensation.

F. Appointment of Secretary

21. The parties concurred in the appointment of a Secretary by the Tribunal, who will be compensated at the rate of US$275/hour.

22. With the parties'consent, the Tribunal appoints Peter Kim, Esq., of Debevoise & Plimpton LLP, in New York, as its Secretary.

G. Advances on costs and payment of invoices

23. With the parties' consent, the Tribunal orders that by 30 November 2010, an advance on costs of US $40,000 each shall be deposited to the PCA account in accord with the instructions set out in Appendix C to this Order.

24. The PCA will review the adequacy of the deposit from time to time and, at the request of the Tribunal, may invite the parties to make supplementary deposits in respect of advances on costs.

25. All payments to the Tribunal shall be made from the deposit, and the Members of the Tribunal shall submit periodic invoices in respect of their fees and expenses in no less than quarterly intervals. Fees and expenses of the PCA shall be paid in the same manner as the Tribunal's fees and expenses.

26. The PCA does not charge a fee for the holding of the deposit, but any transfer fees or other bank charges will be charged to the account. No interest will be paid on the deposit.

H. Seat of arbitration

27. Article 8 of the Treaty does not specify the juridical seat of the arbitration, and the parties agree that the Tribunal has authority to designate the seat. The Tribunal discussed the possible seats with the parties, and all parties expressed their understanding that judicial proceedings relating to the award could be filed in the seat. Claimants expressed a preference for Stockholm or Geneva as the seat, but indicated that they would consent to New York; Respondent expressed a preference for Singapore, but also indicated that it would consent to New York.

28. In these circumstances, the Tribunal designates New York, New York, U.S.A., as the juridical seat of the arbitration.

29. The Tribunal notes the parties' mutual expectation that Singapore will be the most efficient venue to hold evidentiary hearings, but it makes no final order on that point at this time.

I. Language of arbitration

30. The parties agree that the language of the arbitration shall be English.

J. Transcription of hearing

31. The parties agree that the hearing and any other meetings with the Tribunal shall be transcribed.

K. Communications

32. All communications with the Tribunal or other parties shall be made at the addresses indicated on Appendices A and B unless any party or Member of the Tribunal advises a change of address.

33. Prehearing submissions should be served as indicated in Section N below. Any other substantial submissions in support of or in opposition to an application for relief should be served in like manner. All routine notifications and communications should be served by email, and no copy need follow by facsimile, regular mail, or courier.

L. Delegation of power to fix time limits

34. The parties agree that the President, acting alone, shall have the power to grant short extensions to time limits, subject to such consultation with the other Members of the Tribunal as he deems appropriate.

M. Procedural rules

35. As noted, Article 8 of the Treaty authorizes the Tribunal to determine its own procedure, but at the same time provides that "the Tribunal may, in the course of determination of procedure, take as guidance the Arbitration Rules of the International Center for Settlement of Investment Disputes." Claimant has proposed that, to ensure certainty in the procedure, the Tribunal adopt the revised UNCITRAL Rules to govern the proceedings.

36. Especially given the statement in the Treaty that the Tribunal may, if it thinks it appropriate, refer to the ICSID Rules as guidance on questions of procedure, the Tribunal sees no reason at this time to adopt rules to govern the proceedings beyond the directions in this Order. It expects that should it be called upon to rule on any procedural issue, the parties will bring to its attention such guidance from the ICSID Rules, the UNCITRAL Rules, or other authorities as they deem appropriate.

37. This ruling is without prejudice to an application that, as to a specific issue or set of issues, the Tribunal specify in advance the rules or procedures that would govern that issue.

N. Prehearing submissions

38. The parties have agreed that the proceedings shall be divided into two phases, the first covering jurisdiction and liability, the second, if necessary, quantum.

39. The parties agreed at the hearing that Claimants' prehearing submissions shall be due four and a half months after the date of the hearing and Respondent's six months after that. Taking account of the overall schedule, the Tribunal fixes Tuesday, 1 March 2011 as the due date for Claimants and Thursday, 1 September 2011 as the due date for Respondent.

40. Claimants agreed to four and a half months after the date for final document production for their reply, and Respondent requested six months for its rejoinder. Taking account of the schedule for document production we set below, and of the utility of completing the exchange of prehearing submissions by November 2012, we set the due date for Claimants' reply submissions at Friday, 8 June 2012 and for Respondents' rejoinder submissions at Friday, 16 November 2012. The parties should treat these deadlines as firm, with brief extensions that would not compromise the remaining schedule to be available by consent or for good cause shown.

41. Each round of prehearing submissions shall consist of a memorial and any witness

statements, expert reports, exhibits, and authorities submitted in support. Subject to a request to allow a witness or expert briefly to supplement or summarize his or her testimony, the witness statements and expert reports will serve as the direct testimony of each witness and expert. The paragraphs of all memorials, witness statements, and expert reports shall be consecutively numbered.

42. Any witness statement subscribed by the witness in a language other than English shall be submitted in the original language with a translation into English.

43. There should be a single numbering sequence for all exhibits, whether submitted as attachments to a witness statement or independently. Respondent's exhibits should start at a number sufficiently high to ensure no overlap with Claimants'. A document already submitted and designated by one party should be referred to by that number by another party. Any document not in English shall be accompanied by a translation into English. An index to a party's exhibits, cumulative after the first submissions, with the exhibit number, date of the document, and brief description, should be submitted with each round of submissions.

44. The parties are encouraged to submit only core exhibits in hard copy, with a complete set of exhibits provided by CD. No inference shall be drawn, or argument heard, from a party's

decision to include or not include a specific document in the core set initially submitted in hard copy.

O. Document production

45. Taking account of the parties' respective proposals set forth in their 30 September 2010 submission and the further discussion at the procedural meeting, the Tribunal directs that any requests for the disclosure of documents be made in the form of a Redfern schedule by Monday, 3 October 2011 and responses to any such requests by Wednesday, 30 November 2011.

46. At a time during the week of 5 December 2011 to be determined, the Tribunal will convene a conference call to address any issues that the Parties cannot resolve.

47. Uncontested disclosure of documents should commence as soon as practicable, proceed on a rolling basis, and be completed by Thursday, 22 December 2011.

48. By the same date, the Tribunal will rule on any contested issues.

49. Final production of documents should be completed by Friday, 3 February 2012.

50. In arguing its position on any dispute relating to document production, a party may refer to the

IBA Rules on the Taking of Evidence in International Arbitration (29 May 2010) to the extent the party believes appropriate, but those Rules will not bind the Tribunal.

51. The Tribunal considers that the general practice in international arbitration is that documents sought by the adverse party may be produced in the language in which they are found, and it therefore makes no order as to translation of documents at this time, except to state its understanding that any translations of responsive documents already prepared at the time of production in the ordinary course of business should also be considered responsive and be produced. Recognizing the potential burden of translation on both sides, however, the Tribunal urges the parties to discuss a protocol on translation, and the ruling in this order is without prejudice to any application that may be made once the requests for disclosure have been served. Any such application should be made by the date on which the responses to requests for disclosure are due.

P. Objections to exhibits or translations

52. On or before Monday, 1 October 2012, Claimants shall raise any objections as to the authenticity or completeness of any exhibit submitted with Respondent's initial prehearing submissions, and Respondent as to the authenticity or completeness of any exhibit submitted with Claimants' initial and reply

prehearing submissions. On or before Friday, 21 December 2012, Claimants will raise any such objections to any exhibits submitted with Respondent's rejoinder submissions. Relevance objections shall be reserved for the hearing, but in making any such objection, the parties should keep firmly in mind the Tribunal's authority to assess weight.

53. By the same dates, the parties shall raise any objections to the translation of witness statements or exhibits, without prejudice to proposals of an alternative translation, for good cause shown, at a later time.

Q. Witnesses

54. On or before Wednesday, 5 December 2012, each side shall identify which of the other side's witnesses and experts they wish to be made available for cross-examination at the hearing. The sponsoring side shall be responsible for securing attendance of the witness.

55. On or before the same date, the parties shall advise of any witnesses who will testify in a language other than English and provide the name and credentials of the interpreter. The nonsponsoring party shall have the right to have a different interpreter present at the hearing.

R. Prehearing conference

56. At a time during the week of 10 December 2012 to be determined, the Tribunal shall convene a prehearing conference by telephone to settle all hearing procedures and logistics, including the time needed for the hearing, any request for opening arguments, the sequence and expected length of testimony of each witness to be called, the procedure for interpretation if any, sequestering of witnesses, the most efficient means of presenting exhibits, the use and exchange of demonstratives, and joint arrangements for a reporting service with LiveNote capability. The Tribunal requests the parties to confer on all such issues prior to that conference.

S. Hearing

57. The parties shall reserve the weeks of 14 and 21 January 2013 for a hearing on jurisdiction and liability. The location and precise schedule will be determined later.

58. A summary of the procedural schedule, including prehearing submissions, disclosure of documents, and the hearing, is attached to this Order as Appendix D.

T. Posthearing proceedings

59. Directions as to posthearing proceedings are reserved for the conclusion of the hearing.

* * *

We will appreciate the parties' continued cooperation.

New York, New York
2 November 2010

Yas Banifatemi Mark A. Clodfelter

/s/ Donald Francis Donovan
Donald Francis Donovan, President
For the Tribunal

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[Appendices A through C omitted]

Appendix D

Schedule of Arbitration

22 November 2010	Parties to advise position on listing of case on PCA docket and publication of decisions and awards
30 November 2010	Advance on costs
1 March 2011	Claimants' prehearing submissions

1 September 2011	Respondent's prehearing submissions
3 October 2011	Requests for disclosure of documents
30 November 2011	Responses to requests for disclosure of documents, including any application concerning translation of documents to be disclosed
During week of 5 December 2011	Conference call re document disclosure
22 December 2011	Uncontested disclosure completed
22 December 2011	Tribunal ruling on contested issues
3 February 2012	Final production of documents completed
8 June 2012	Reply submissions
1 October 2012	Objections to exhibits or translation of witness statements or exhibits from initial and reply submissions
16 November 2012	Rejoinder submissions

5 December 2012	Identification of witnesses and experts for crossexamination and of witnesses who will testify in language other than English
During week of 10 December 2012	Prehearing conference call
21 December 2012	Objections to exhibits or translation of witness statements or exhibits from rejoinder submissions
14-25 January 2013	Hearing on jurisdiction and liability
Directions reserved	Posthearing submissions

APPENDIX E

Excerpts from Chapters 1 and 2 of the Federal Arbitration Act, 9 U.S.C. § 1 *et seq*.

9 U.S.C. § 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms

of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if

the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

9 U.S.C. § 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration–

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing,

upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

9 U.S.C. § 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration–

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. § 207. Award of arbitrators; confirmation; jurisdiction; proceeding

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

9 U.S.C. § 208. Chapter 1; residual application

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.